(26,276)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 809.

NORTHERN PACIFIC RAILWAY COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, PLAINTIFFS IN ERROR,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1918.

1-2 Filed in Supreme Court of Washington Apr. 21, 1916. C. S. Reinhart, Clerk. F. S. G.

13464.

No. 6428.

STATE OF WASHINGTON on the Relation of PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Plaintiff & Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Defendants & Respondents.

Transcript on Appeal.

Superior Court, Lewis County, Wash. Recd. & Filed Apr. 20, 1916. B. S. Gage, Clerk, by A. Tripp, Deputy.

3 No. 6428.

THE STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff & Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants & Respondents.

Transcript on Appeal.

F. M. Dudley and F. M. Barkwill, Attorneys for Plaintiff.
Geo. T. Reid, J. W. Quick & L. B. Da Ponte, Attorneys for defendant Northern Pacific Railway Company.
Scott Z. Henderson, Attorney for defendant Public Service Commission.

4 In the Superior Court of the State of Washington, Holding Terms in and for the County of Lewis.

THE STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Petition.

The lelator respectfully shows unto the above entitled court and avers as follows:

I.

That the above named relator, Puget Sound & Willapa Harbor Railway Company, is a corporation organized and existing under the laws of the State of Washington.

II.

That the said relator, Puget Sound & Willapa Harbor Railway Company has paid unto the Secretary of State of the State of Washington its annual license fee last due and has in all respects complied with the laws of said state authorizing it to carry on its business as a railway corporation in said state.

III.

That the said defendant, Northern Pacific Railway Company, is a corporation organized and existing under the laws of the State of Wisconsin.

That the said Public Service Commission of the State of Washington is that certain commission created, organized and existing under and by virtue of the Public Service Commission law of said state.

III.

That to wit: In June 1914, the said Puget Sound & Willapa Harbor Railway Company (hereinafter referred to as the "Willapa Harbor Company") filed with the said Public Service Com-
5 mission of the State of Washington its petition wherein it alleged, among other things, that it was engaged in the construction of a railway line extending from the city of Raymond, in Pacific County, Washington, to a point of connection with the railway line of the Chicago, Milwaukee & St. Paul Railway Company in

section five (5) township sixteen (16) north range two (2) West, W. M. in Thurston county, Washington; that the said Pacific Company was the owner of and operating a certain railway line extending from the city of Centralia, in Lewis county, Washington, westerly to the city of South Bend, in Pacific County, Washington; that the railway being constructed by the Willapa Harbor Company would intersect the railway of the Pacific Company at a point definitely shown in said petition situated in the northeast quarter (N. E. ¼) of section one (1), in township thirteen (13) north, range three (3) West, A. M., in Lewis county, Washington, and the said petitioner in and by its said petition prayed that the said commission fix a time and place for the hearing of said petition and notify the Pacific Company thereof, and that at said hearing the said commission would grant unto the petitioner permission to construct its said railway across the railway of the Pacific Company at said point at grade; that said petition was filed with the said public service commission and numbered 1737 of the proceedings before said commission.

That at the same time the said Willapa Harbor Company filed with said Public Service Commission its petition wherein it alleged, among other things, that it was engaged in the construction of a railway line extending from the city of Raymond, in Pacific county, Washington, to a point of connection with the railway line of the Chicago, Milwaukee & St. Paul Railway Company in section five (5), township sixteen (16) north, range two (2) West, W. M., in Thurston county, Washington; that the said Pacific Company was the owner of, and operating, a certain railway line extending from the city of Centralia, in Lewis county, Washington, westerly to the city of South Bend, in Pacific county, Washington; that the railway being constructed by the Willapa Harbor Company would intersect the railway of the Pacific Company at a point definitely shown in said petition, situated in section one (1), township thirteen (13) north, range five (5) west, in Lewis county, Washington, and the said petitioner, in and by its said petition, prayed that the said commission fix a time and place for the hearing of said petition and notify the Pacific company thereof, and that at said hearing the said commission would grant unto the petitioner permission to construct its said railway across the railway of the Pacific Company at said point at grade; that said petition was filed with the said Public Service Commission and numbered 1738 of the proceedings before said commission.

That notice was served in said proceedings and said petitions came on to be heard before the Public Service Commission at Olympia, Washington, July 20, 1914, the said Willapa Harbor Company and the said Pacific Company each appearing at said hearing; that by stipulation the hearings upon said petitions were consolidated and testimony was adduced by each of the said parties.

That after the taking of such testimony, and before any determination of or order with respect to the matters in controversy was made by the public service commission, the said railway companies made and entered into a certain contract in writing, a true and correct copy of which is attached as Exhibit "A" to a stipulation made and

entered into between the said railway companies on to wit: March 26, 1915, a copy of which said stipulation, together with all exhibits therein referred to and thereunto attached, is hereunto attached as Exhibit "X" and hereby referred to and made a part of this petition; that after entering into said contract Exhibit "A," the said parties caused to be filed a copy thereof with the said Public Service Commission and thereafter, to wit October 30, 1914, the said Public Service Commission made and entered its findings of fact and
7 conclusions in the matter of said applications, a true and correct copy of which findings and conclusions is attached to said Exhibit "X" as Exhibit "B," and thereupon the said commission made and entered its certain order in said matter, a true and correct copy of which is attached to said Exhibit "X" as Exhibit "C."

That thereafter the said railway companies made and entered into a certain stipulation for the construction of interlocking plants at said crossings, a true and correct copy of which stipulation is attached to said Exhibit "X" as Exhibit "D."

That thereafter, to wit: on or about the 22nd day of January, 1915, the said Willapa Harbor Company filed with the said Public Service Commission of Washington its petition for the apportionment between the said Willapa Harbor Company and said Pacific Company of the costs of construction and the expense of maintenance and operation of said interlocking plants, a true and correct copy of which petition is hereunto attached as Exhibit "W." At the same time the said Willapa Harbor Company filed with the said Public Service Commission said stipulation Exhibit "D."

That said petition for the apportionment of the costs of construction and the expense of maintenance and operation of said interlocking plants came on to be heard before the said Commission March 26, 1915; that the said Willapa Harbor Company and the said Pacific Company each appeared and were represented at said hearing; that at said hearing the said stipulation Exhibit "X," hereunto attached and hereby referred to and made a part of this petition, was made and entered into between the said railway companies and filed with the said commission; that after the filing of said stipulation certain testimony was taken and proceedings had, all of which testimony and proceedings were duly made a matter of record in the office of the said public service commission. That at the conclusion of said hearing the said commission reserved its decision and
8 took the application of the said Willapa Harbor Company for the apportionment of costs and expenses under consideration.

IV.

That on to wit: December 22, 1915, the said commission made and entered its findings and conclusions in the matter of the petition of the said Willapa Harbor Company for the apportionment of the costs of construction and expense of maintenance and operation of said interlocking plants between the Willapa Harbor Company and the Pacific Company and thereafter, to wit: on December 24, 1915, caused to be served upon the Willapa Harbor Company a copy

of said findings of fact and conclusions; that a copy of said findings of fact and conclusions is hereunto attached as Exhibit "Y" and hereby referred to and made a part hereof. That at the time of making and filing its said findings and conclusions the Public Service Commission made and entered its certain order in said proceeding and thereafter, to wit: on the 29th day of December, 1915, caused a copy thereof to be served upon the said Willapa Harbor Company; that a true and correct copy of said order is hereunto attached as Exhibit "Z" and hereby referred to and made a part hereof.

V.

And your petitioner avers that there is error in the findings and conclusions and order of the said commission as follows:

(*a*) That finding No. 2 of said findings is wholly irrelevant and immaterial.

(*b*) That finding No. 4 is contrary to the evidence and is inconsistent and in conflict with finding No. 3.

(*c*) That finding No. 5 is wholly irrelevant and immaterial.

(*d*) That the conclusion, that it would be unreasonable to require the Northern Pacific Railway Company to bear any portion of the cost of construction and installing and maintaining the interlocking devices at the said crossings, is not supported by the findings
9 but is inconsistent and in conflict with finding No. 2, and is inconsistent and in conflict with the provisions of chapter 30 of the laws enacted at the Thirteenth Session of the Legislature of the state of Washington, being an act approved March 6, 1913, and with the provisions of section 13, of article 12 of the constitution of the state of Washington, and with the provisions of section 8736 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

(*e*) That the order Exhibit "Z," so made and entered by the said commission, is unreasonable, unjust, inconsistent and in conflict with the provisions of said chapter 30 of the laws enacted at the thirteenth session of the legislature of the state of Washington, with said section 13, of article 12 of the constitution of the state of Washington, with said section 8736 of Remington & Ballinger's Annotated Codes and Statutes of Washington and with said finding No. 3.

VI.

That the said plaintiff has no plain, speedy or adequate remedy at law, or any remedy, save and except as provided in section 13 of said chapter 30 of the laws enacted at the thirteenth session of the legislature of the state of Washington.

Wherefore, plaintiff*s* prays:

(1) That a writ of review be issued under the seal of said court requiring and directing the said defendant, Public Service Commission of the state of Washington, to certify and transmit to this court a full and complete record of all of the proceedings had be-

fore the commission, or any member thereof, upon the petition of the Puget Sound & Willapa Harbor Railway Company for an apportionment between said Railway Company and the said Northern Pacific Railway Company of the costs of construction and the expense of maintenance and operation of said interlocking plants, and of all testimony offered and introduced at the hearing of said petition, including all exhibits and stipulations then filed and made a part of said record and of the proceedings in said matter.

(2) That the said court, upon such record and transcript, inquire into and determine the reasonableness and lawfulness of the findings, conclusions and order made and entered December 22, 1915, by the said commission, being the findings, conclusion and order copies of which are attached to the petition herein as Exhibits "Y" and "Z."

(3) That the said court, at said hearing, vacate and set aside the said finding No. 2, finding No. 4, finding No. 5, the said conclusion and the said order of the said commission made and entered December 22, 1915, as unreasonable and unlawful and either apportion the costs of construction, operation and maintenance of said interlocking devices between the said railway companies in such manner as shall be just, reasonable and equitable, or make and issue its order unto the said commission directing and requiring the said commission so to do.

(4) That the said relator have such other and further relief as is just and equitable, including its costs herein.

F. M. DUDLEY AND
F. M. BARKWILL,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of King, ss:

F. M. Dudley, being first duly sworn, doth depose and say: That the above named relator, Puget Sound & Willapa Harbor Railway Company is a corporation, as alleged in the foregoing petition, and that he is an officer and agent thereof, to wit: one of the trustees and general attorney of said relator; that affiant had direct and personal charge and supervision over all of the matters and thing- alleged and charged in the foregoing petition, and had and has, personal knowledge thereof; that no other officer or agent of the said relator has such personal knowledge of all of said matters and things and that affiant for said reason makes this affidavit for and on behalf of the said relator; that affiant has read the foregoing petition, knows the facts therein set forth, and that the same are true of his own knowledge. F. M. DUDLEY.

Subscribed and sworn to before me this 10th day of January, A. D. 1916.

[NOTARIAL SEAL.] FLOYD H. WILLIAMS.
Notary Public in and for the State of Washington, Residing at Seattle, in said County and State.

12 STATE OF WASHINGTON,
County of King, ss:

A. H. Barkley, being first duly sworn, deposes and says: That the said relator, Puget Sound & Willapa Harbor Railway Company is a corporation, as alleged in the foregoing petition, and that affiant is an officer thereof, to wit: its assistant secretary; that he has read the foregoing petition, knows the contents thereof and that the same is true as he verily believes.

A. H. BARKLEY.

Subscribed and sworn to before me this 10th day of January, A. D. 1916.

[NOTARIAL SEAL.] FLOYD H. WILLIAMS,
Notary Public in and for the State of Washington, Residing at Seattle in said County and State.

13 EXHIBIT "W."

Before the Public Service Commission of the State of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Petition for Apportionment of Costs of Crossings.

Your petitioner, the Puget Sound & Willapa Harbor Railway Company respectfully shows unto your Honorable Body:

I.

That pursuant to the order made and entered in the above entitled proceedings October 30, 1914, your petitioner and the Northern Pacific Railway Company have agreed upon and submit herewith to your Honorable Body plans and specifications for interlocking plants to be constructed pursuant to said order for the protection of those two certain grade crossings by your petitioner's railway over the South Bend-Chehalis Branch of the Northern Pacific Railway Company's railway more particularly described as follows, to wit:

14 (*a*) The crossing referred to in Proceeding No. 1738 located in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis county, Washington, hereinafter referred to as the "Chehalis Crossing."

(*b*) The crossing referred to in Proceeding No. 1738 situated in section one (1), township thirteen (13) north, of range five (5) West, W. M., hereinafter referred to as "Dryad Crossing."

II.

That the estimated cost of construction of the said interlocking plant at the Chehalis Crossing is as follows, to wit:

Material:

8 working lever plant	$2,000.00
4 semi automatic Elec. Dist. Sigs	1,800.00
2 Fixed signals	30.00
Normal indication & time locking	700.00
Annunciators	250.00
Tower	800.00
15% of material a/c freight & handling	833.00
	$6,413.00

Labor:

Signal Department	$1,300.00	
Telegraph Department	250.00	
B. & B. Department	700.00	
10% of Labor a/c Supervision & use of tools.	225.00	
		2,475.00
		$8,888.00

That the estimated cost of construction of the said interlocking plant at the Dryad Crossing is as follows, to wit:

Material:		
10 Working lever plant	$2,500.00	
4 Semi automatic Elec. Dist. Signals	1,900.00	
2 Fixed signals	30.00	
Normal indication & Time locking	700.00	
Annunciators	270.00	
Tower	800.00	
15% of Nat'l a/c freight and handling	930.00	
		$7,130.00
Labor:		
Signal Department	$1,500.00	
Telegraph Department	250.00	
B. & B. Department	700.00	
10% of Labor a/c supervision & use of tools	245.00	
		$2,695.00
		$9,825.00

That in addition to the said cost of constructing said interlocking plants, it will be necessary to incur and pay costs of maintenance and operation thereof. That your petitioner and the said Northern Pacific Railway Company have been and are unable to agree between themselves as to an apportionment of the cost and expense of construction, installation, maintenance and operation of said interlocking plants; that your petitioner is ready and willing to pay that proportion of said costs which is fair and equitable, but that the said Northern Pacific Railway Company has refused, and still refuses, to pay or contribute to any portion of said costs of construction, installation, maintenance or operation; that the installation, maintenance and operation of said interlocking plants has been at all times demanded by the said Northern Pacific Railway Company as a condition precedent to granting to your petitioner the right to construct its railway across the railway track of the Northern Pacific Railway Company at said points at grade, and that the said plants are for the benefit and protection of the said Northern Pacific Railway Company, and of its track and railway operations thereon to an extent equal to or greater than the benefit which your petitioner can or will derive therefrom, and your petitioner shows that of the total number of twenty-three (23) units at each of said interlocking plants, thirteen (13) thereof at each plant are for the benefit of the said Northern Pacific Railway Company and ten (10) thereof for the benefit of your petitioner; that the apportionment of the cost of construction, installation, maintenance and operation of said interlocking plants upon the basis of units is fair and equitable.

Wherefore, your petitioner prays your Honorable Body to fix a time and place for the hearing of this petition, and to notify the Northern Pacific Railway Company thereof, and that at said hearing

you will apportion between the said Northern Pacific Railway Company and your petitioner upon an equitable basis and according to law the costs of construction and the expense of maintenance and operation of said interlocking plants.

16 PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY,
By F. M. DUSLEY, *Attorney.*

17 EXHIBIT "X."

Before the Public Service Commission of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Stipulation.

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts shall, for the purposes of the hearing upon the application of the Puget Sound & Willapa Harbor Railway Company for an apportionment of the costs of the crossing referred to in Proceeding No. 1737 located in the northeast quarter (NE¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis county, Washington, and of the crossing referred to in Proceeding No. 1738 situated in section one (1), township thirteen (13) north, Range five (5) West, W. M., and of the cost of installing, maintaining and operating the interlocking plants ordered at said crossings, be deemed and taken

18 to be true,

1. That to wit: in June, 1914, the Puget Sound & Willapa Harbor Railway Company filed with the Public Service Commission of the State of Washington its petition for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (NE¼) of Section one (1), township thirteen (13) north, range three (3) West in Lewis county, Washington; the said application was numbered 1737 of proceedings before said Public Service Commission.

2. That at the same time the said Puget Sound & Willapa Harbor Railway Company filed with the Public Service Commission of the state of Washington its petition for permission to cross at grade certain railway tracks, among which was the railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, of range five (5) West, in Lewis county, Washington, that said proceeding was numbered 1738 of proceedings before the Public Service Commission of the state of Washington.

3. That notice having been duly served in said proceedings, the said petitions came on to be heard before the Public Service Commission at Olympia, Washington, July 20, 1914, the said Puget Sound & Willapa Harbor Railway Company and the said Northern Pacific Railway Company each appearing at said hearing; that by stipulation the hearings upon said petitions were consolidated, and that testimony was adduced by each of said parties, which said testimony was taken and is of record in the office of the Public Service Commission of the state of Washington.

4. That at said hearing the Northern Pacific Railway Company admitted that grade crossings at said points should be ordered but contended that such grade crossings should be interlocked, and that the Puget Sound & Willapa Harbor Railway Company should pay the entire cost and expense of installation, maintenance and operation of same; that the said Puget Sound & Willapa Harbor Railway Company contended that no present necessity for interlocking existed and further contended that if an interlocking device
19 should be ordered by the Public Service Commission, the Northern Pacific Railway Company should pay a reasonable proportion of the cost and expense thereof, as provided by the statute of Washington; that the testimony adduced at said hearing on behalf of the Puget Sound & Willapa Harbor Railway Company tended to show that the installation of interlocking plants was primarily to avoid the cost and delays involved in stopping trains at grade crossings where such plants were not installed; that the testimony adduced at said hearing on behalf of the Northern Pacific Railway Company tended to show that the purpose of installing interlocking plants at said grade crossings was two-fold; (*a*) to secure safety of operations, and (*b*) to avoid the delays and costs of stopping trains at such crossings.

5. That after the taking of said testimony and before any determination upon said applications was made by the Public Service Commission, the said Railway Companies made and entered into a

contract in writing a true and correct copy of which is hereto attached as Exhibit "A."

6. That after the making and execution of said contract Exhibit "A," the said parties advised the Public Service Commission thereof and thereafter, to wit: on the 30th day of October, A. D. 1914, the said Public Service Commission made and entered its findings of fact and conclusions in the said hearing, a true and correct copy of which is hereunto attached as Exhibit "B," and thereupon said commission made and entered its certain order in said hearing, a true and correct — of which is hereunto attached as Exhibit "C."

7. That thereafter, the said Northern Pacific Railway Company and the said Puget Sound & Willapa Harbor Railway Company made and entered into their certain stipulation for the construction of said interlocking plants, a true and correct copy of which stipulation is hereunto attached as Exhibit "D."

8. That thereafter, to wit: on the — day of November, A. D. 1914, the said Puget Sound & Willapa Harbor Railway Company caused said stipulation Exhibit "D" to be filed with the Public Service Commission together with its petition for apportionment of costs of said crossings, and that the said plans for said interlocking plants have been heretofore approved by the Public Service Commission.

9. That the said Puget Sound & Willapa Harbor Railway Company is, pursuant to its said agreement with the Northern Pacific Railway Company, causing said interlocking plants to be constructed but the same are not yet complete and the actual cost thereof is not yet determined.

10. It is further stipulated between the parties hereto that the Public Service Commission shall, subject to all objections upon the part of the Northern Pacific Railway Company as to the jurisdiction of such commission, determine first, as to whether or not any portion of the costs of installing said interlocking plants and crossings, and any part of the costs of maintenance or operation thereof, shall be borne by the Northern Pacific Railway Company, and second, if the said Commission shall determine that any part of said costs, either of installation, maintenance or operation shall be borne by the Northern Pacific Railway Company, it shall determine the principals by which such apportionment shall be made, but it shall not be necessary for said commission to determine the exact amount in dollars and cents which shall be borne and paid by either party, it being understood that the said parties will apportion actual costs of construction, maintenance and operation of said plants between themselves in accordance with the principles of apportionment which shall be finally settled and determined by the Public Service Commission; or in the event of a review of the decision of such commission in court, by the final determination of the proper tribunal ultimately deciding the principles by which such apportionment shall be made.

11. It is understood and agreed that in the event either party shall apply for a writ of review of such decision as the Public Service Commission may make in this hearing, it shall not be necessary to certify up as a part of the record the original ap-

plications filed by the Puget Sound & Willapa Harbor Railway Company, or any of the proceedings or records save and except the application of the Puget Sound & Willapa Harbor Railway Company for an apportionment of said costs, this stipulation, such other evidence as either party may see fit to adduce at said hearing and the findings, conclusions and orders of the commission made herein, it being the purpose of this stipulation to restrict and limit the papers, documents and files which might otherwise be required to be certified as a part of the record in the event that either party should sue out a writ of review, as provided by the laws of the state of Washington.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY,

By F. M. DUDLEY, *General Attorney.*

NORTHERN PACIFIC RAILWAY COMPANY,

By GEO. T. REID, *Western Counsel.*

22 EXHIBIT "A."

Whereas the Puget Sound & Willapa Harbor Railway Company has petitioned the Public Service Commission for a grade crossing on its Willapa Harbor Line over what is known as the "South Bend Branch" of the Northern Pacific Railway Company in Section one (1), Township Thirteen (13) North, range five (5) West, W. M., and for a grade crossing in the northeast quarter (N. E. ¼) of Section one (1), Township Thirteen (13) North, Range three (3) west, W. M., both in Lewis county, Washington, said petitions being Nos. 1737 and 1738, respectively, on the docket of the public Service Commission; and

Whereas the Northern Pacific Railway Company has agreed and consented that a grade crossing may be granted at said points, but contended at the hearing of the said applications before the Public Service commission at Olympia on the 20th day of July, 1914, and subsequent days, that the said grade crossings should be interlocked, and that the said Puget Sound and Willapa Harbor Railway Company should pay the entire cost and expense of installation, maintenance and operation of same; but the said Puget Sound & Willapa Harbor Railway Company contended that no present necessity for interlocking exists, and further contended that, if an interlocking device should be ordered by the Public Service Commission, the Northern Pacific Railway Company should pay a reasonable proportion of the cost and expense thereof as provided by the statutes in such cases; and

Whereas the parties have reached an agreement concerning the said contentions hereinbefore set forth,

Therefore, it is hereby agreed by and between the said Puget Sound & Willapa Harbor Railway Company, hereinafter called "Puget Sound Company" and the Northern Pacific Railway Company, hereinafter called "Pacific Company," as follows:

23

I.

The Puget Sound Company agrees and binds itself to install an approved interlocking device at each of said crossings at its own cost and expense and to maintain and operate the same at its own cost and expense, unless it shall be determined that the Pacific Company should pay any part of such cost of installation, operation and maintenance, as hereinafter provided.

II.

The Pacific Company agrees that the Puget Sound Company may install a temporary crossing at said points described in said causes Nos. 1737 and 1738 for the use of the construction trains of the Puget Sound Company, providing such protection in the way of flagmen, or otherwise, at said crossings so that the Pacific Company's trains may use the same without the necessity of coming to a stop, and pending the installation of said interlocking device the Pacific Company's trains shall have the right of way at said crossings.

III.

The Puget Sound Company agrees to install said interlocking device at the earliest practicable moment and prior to using said crossing for commercial business and within a period of not to exceed four months. But if for any reason beyond the control of the said Puget Sound Company, said interlocking device cannot be installed within four months, then the time therefor shall be extended further to such reasonable time as may be agreed upon, and if the parties cannot agree then within such further time as the Public Service Commission may allow therefor.

IV.

It is further understood and agreed that in case the said interlocking device cannot be installed prior to the completion of the railroad of the Puget Sound Company and operation of revenue trains thereon that said company may use the said crossings for commercial business pending the installation of the said
24 interlocking device as soonas possible as hereinbefore provided.

V.

It is further understood and agreed that said causes Nos. 1737 and 1738 shall proceed to a final hearing before the Public Service Commission on the question as to whether or not any part of the cost of installation, maintenance or operation of said interlocking device shall be apportioned by said Public Service Commission to the Pacific Company, and if it shall be found and determined in

said causes by the commission, or on appeal to the courts, and adjudged by final judgment in said causes, that the Pacific Company should pay any part of the cost of installation, maintenance or operation of said crossings, the Pacific Company will pay to the Puget Sound Company such part of said cost as may be finally adjudged against it without interest, it being understood that this contract shall not prejudice or affect in any way the contentions made by the respective parties as to the apportionment of the cost of installation, operation and maintenance of the said interlocking device; nor the right of the Pacific Company to recover such damages as may be allowed by law in case the Puget Sound Company had been required to prosecute an eminent domain action before being allowed to cross, it being understood that the Pacific Company waives no right to damages or compensation by having consented to the car crossing prior to the ascertainment of the of the compensation to which it is entitled by law therefor.

Witness the signatures of the parties hereto this 1st day of August, 1914.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY,
By C. A. GOODNOW, *President.*
NORTHERN PACIFIC RAILWAY COMPANY,
By GEO. T. REID, *Assistant to the President.*

O. K.
F. M. DUDLEY.

Witnesses:
——— ———.
——— ———.

25 EXHIBIT "B."

Before the Public Service Commission of the State of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Findings of Fact and Conclusion.

The above entitled proceedings having come on to be heard before the Public Service Commission of the state of Washington, at the city of Olympia, Washington, pursuant to notice, on the 20th day of July, A. D. 1914, the applicant Puget Sound & Willapa Harbor Railway Company appearing by its attorney F. M. Dudley, and the respondent Northern Pacific Railway Company, appearing by its attorney, L. B. da Ponte and George Leudinghaus and Frank Leudinghaus, co-partners under the firm name and style of Leudinghaus Brothers, not appearing but having filed their consent in writing to the granting of the application of the Puget Sound & Willapa Harbor Railway Company, and testimony with respect to the matter in controversy having been duly admitted, and the commission being advised in the premises:

26 The Commission finds:

(1) That the Puget Sound & Willapa Harbor Railway Company and the Northern Pacific Railway Company are corporations organized and existing under the laws of the state of Washington and of the state of Wisconsin respectively.

(2) That the Puget Sound & Willapa Harbor Railway Company is engaged in the construction of a railway line extending from the city of Raymond, in Pacific county, Washington to a point of connection with the railway line of the Chicago, Miiwaukee & St. Paul Railway Company in section five (5), township sixteen (16) north, range two (2) West, W. M., in Thurston County, Washington.

(3) That the Northern Pacific Railway Company owns, and is operating, a railway line extending from the city of South Bend, in Pacific County, Washington, to the city of Chehalis, in Lewis county, Washington, where said railway line connects with a railway line owned and operated by said company from Portland, Oregon to Puget Sound.

(4) That the railway line of the petitioner, as located and being constructed, intersects the said South Bend-Chehalis line of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), in township thirteen (13) north, range three (3) West, W. M., and that the location and elevation of said railway and proposed railway are correctly shown upon the plat Exhibit "A," attached to the petition filed in said application No. 1737, and that the allegations of said petition with respect to the location, elevation and grades of said railways at said intersection are true, that the lands at and adjacent to said proposed crossing

are level and that the view of the said proposed crossing each way on each of the said railway tracks will be unobstructed for a distance in excess of 4,000 feet.

That the elevation of said Northern Pacific Company's
27 railway line and of the line being constructed by the Puget Sound & Willapa Harbor Company is but little above the level of high water from the Chehalis River and that it is impracticable to depress the grade of either of said lines at said point.

That in order to carry the railway line of the Puget Sound & Willapa Harbor Company over and above the railway line of the Northern Pacific Company at said point, it would be necessary to elevate the grade of the Puget Sound & Willapa Harbor Company's line at said point approximately 24 feet, and that such elevation would, in order to secure and maintain proper grades for the line of the Willapa Harbor Company, cost the Puget Sound & Willapa Harbor Railway Company approximately $193,000.00 *dollars* in excess of what the construction of said crossing as a grade crossing would cost, and that thereby grades would be made in the railway track of the Puget Sound & Willapa Harbor Railway Company, which would increase the cost of operation over said railway line.

(5) That the petitioner's railway line, as located and being constructed, intersects the said South Bend-Chehalis railway line of the Northern Pacific Railway Company in section one (1), township thirteen (13), north, range five (5) West, W. M., in Lewis county, Washington, at the point and angle indicated by the letter "B" upon the plat Exhibit "A," attached to the petition filed by the said Puget Sound & Willapa Harbor Railway Company in application 1738, and that the elevation and location of said tracks at and adjacent to said crossing are correctly shown upon said plat; and that the allegations of the said petition with respect to the grades of said railway tracks at and adjacent to said crossing are true.

That the view on each of said railway lines approaching said crossing is unobstructed for more than 4,000 feet in every direction, save and except the approach to said crossing from the Northern Pacific Railway Company's line from the northeast; that the
28 approach to said crossing over and along said line from the northeast is unobstructed for a distance in excess of 4,000 feet.

(6) That the country at and in all directions from said point of crossing is level, save and except as the level thereof is broken by the bed of the Chehalis river.

That the elevation of said tracks at the said point of intersection is but little above the level of high water of the Chehalis river and that it is impracticable to depress the level of either of said roads.

That in order to carry the railroad tracks of the Puget Sound & Willapa Harbor Railway Company's line over and above the railway track of the Northern Pacific Railway Company's line would require the elevation of the Puget Sound & Willapa Harbor Company's railway tracks approximately 24 feet at the said point of intersection; that the cost of so elevating said tracks and of the approaches thereto on each side so as to secure reasonable grades would amount to $348,-

000.00 dollars in excess of the cost of constructing said road at such grade as is required for a grade crossing and as has been adopted and is being constructed by said company; that the elevation of said railway line, so as to carry the same over the railway line of the Northern Pacific Company at said point would render it impracticable for said railway line to serve any of the industries or citizens of the town of Dryad.

(7) That the Northern Pacific Railway Company is at the present time operating over its South Bend-Chehalis line two passenger trains and one regular freight train each way daily; that it also operates from time to time extra trains over said road, and that it is probable that in the future it will be required to operate each way daily an additional freight or logging train; that the Puget Sound & Willapa Harbor Railway Company expects to operate over its said railway, when completed, two passenger trains and one freight train each way daily.

29 (8) That the said Northern Pacific Railway Company has constructed and in operation an industrial spur track extending from a connection with its South Bend-Chehalis railway in the northwest quarter of section eleven (11) township thirteen (13) north, range five (5) W. W. M. northwesterly to a sawmill operated by the Doty Lumber & Shingle Company in the southwest quarter (S. W. ¼) of section two (2), township and range aforesaid; that the location of said spur track is shown upon the plat Exhibit "A," attached to the petition filed by the Puget Sound & Willapa Harbor Railway Company in application No. 1738, and is indicated on said plat by the white line extending from point "1" to point "2."

That the railway line being constructed by said petitioner intersects said industry spur 1-2 at the point and angle indicated upon the said plat by the letter "A" said point being situated in the southwest quarter (S. W. ¼) of section two (2), township thirteen (13), north, range five (5) West, W. M.

That the elevation of said industrial spur and of the proposed railway line of the petitioner is correctly shown upon the plat Exhibit "B," attached to said petition; that the allegations of paragraph 11 with respect to said proposed crossing are true.

(9) That the said Northern Pacific Railway Company has constructed and in operation an industrial spur track extending from a point of connection with its South Bend-Chehalis Railway in section one (1), township thirteen (13) north, range five (5) West, W. M., through and to a point south of the town of Dryad, in Lewis county, Washington; that the location of said spur track is correctly shown upon the plat Exhibit "A" attached to the petition filed in said application No. 1738 by the broken line extending from the point on said plat indicated by the figure "3" to the point of said plat indicated by the figure "4." That the railway being constructed by said Puget Sound & Willapa Railway Company intersects

30 said industrial spur "3-4" at the point indicated on said Exhibit "A" by the letter "C" and at the angle there shown.

That the elevations of said tracks at and adjacent to said point of

intersection are correctly shown upon the profile plat Exhibit "C" attached to said petition and that the allegations of paragraph 13 of said petition, with respect to said crossing, are true.

(10) That George Leudinghaus and Frank Leudinghaus are residents of the town of Dryad and are co-partners conducting a lumbering business in said town under the firm name and style of Leudinghaus Brothers; that the said Leudinghaus Brothers have constructed and in operation a logging railway track shown upon the plat Exhibit "A" attached to the petition in application No. 1738 by the broken line extending from the point shown upon said plat by the figure "5" to and beyond the point shown upon said plat by the figure "6."

That the railway track being constructed by the Puget Sound & Willapa Harbor Railway Company intersects the said logging railway of Leudinghaus Brothers at the point shown upon said plat Exhibit "A" by the letter "D" and at the angle shown upon said exhibit; that the elevations of said respective tracks at and adjacent to said crossing are correctly shown upon the plat attached to said petition as Exhibit "D," and that the allegations of paragraph 14 and 15 of said petition are true.

(11) That the allegations of paragraph 16 of the said petition in said application No. 1738 are true.

(12) That it will be impracticable to elevate the railway track of the petitioner sufficient to carry it over and above the South Bend-Chehalis railway of the said Northern-Pacific Railway Company at the crossing shown upon said plat by the letter "B" without also elevating it so as to carry it above the crossings shown upon said plat by the letters "C" and "D."

That save and except as hereinbefore stated the allegations of the petitioners in said applications numbered 1737 and 1738 are true.

31 (13) That taking into consideration the amount and character of travel on the railway line of the Northern Pacific Railway and of the amount and character of the business transacted over said industrial spurs, and the amount and character of travel anticipated to be done over the railway line of the Puget Sound & Willapa Harbor Railway Company, the cost of separating grades, the topography of the country and of other circumstances and conditions as shown, it is impracticable to separate the grade of the Puget Sound & Willapa Harbor Railway from the grade of the said South Bend-Chehalis branch of the Northern Pacific Railway and said spur tracks at said crossings, or any thereof.

(14) That adequate protection for the public travel over and along the said South Bend-Chehalis line and for the travel which it is anticipated will be done over the railway line of the Puget Sound & Willapa Harbor Railway Company will be afforded by the installation of an interlocking device of proper character at the said crossing in the northeast quarter of section one (1), township thirteen (13) north, range three (3) west, W. M. in Lewis county, Washington, shown upon the plat Exhibit "A" attached to the petition filed in application No. 1737 and by the installation of an inter-

locking device of proper character at the said crossing in section one (1), township thirteen (13) north, range five (5) west, W. M., in Lewis county, Washington, indicated upon the plat Exhibit "A" attached to the petition in application 1738 by the letter "B."

Conclusions.

That the Puget Sound & Willapa Harbor Railway Company should be granted authority to construct, maintain, and operate the proposed railway over and across the South Bend-Chehalis railway line of the Northern Pacific Railway Company and over the said industrial spurs and logging railroad at the points shown in said petitions at grade; subject, however, to the condition that an
32 interlocking device of approved character shall be installed as soon as practicable upon the construction of said Puget Sound & Willapa Harbor Railway over the railway line of the Northern Pacific Railway Company at the said crossings shown upon the plat Exhibit "A" attached to the petition in application 1737 and by the letter "B" upon the plat Exhibit "A" attached to the petition in said application No. 1738.

Made and entered this 30th day of October, A. D. 1914.

PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON.
ARTHUR A. LEWIS.
FRANK R. SPINNING.

33 Exhibit C.

Before the Public Service Commission of the State of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E.) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Order.

The above entitled matters having come on to be heard on the 20th day of July, A. D. 1914, upon the application of the Puget Sound & Willapa Harbor Railway Company for permission to construct, maintain and operate a railway line being constructed by it over and across the South Bend-Chehalis railway line of the Northern Pacific Railway Company in the northeast quarter (N. E.) of section one (1), township thirteen (13) north, of range three (3) west, W. M., in section one (1), township thirteen (13) north, range five (5) west, W. M., and over and across an industrial railway spur in section two (2), township thirteen (13) north, range five (5) west
34 W. M. and over and across a certain industrial spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M. and over and across a logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) West W. M., and the said petitioner Puget Sound & Willapa Harbor Railway Company having appeared by its attorney, F. M. Dudley, and the said respondent Northern Pacific Railway Company having appeared by its attorney L. B. Da Ponte, and the said respondents Leudinghaus Brothers not appearing but having filed their consent to the said crossing as applied for by the said Puget Sound & Willapa Harbor Railway Company, and testimony having been adduced, and the said commission having heretofore made and filed its findings of fact and conclusions in said praceedings;

Now therefore,

It is ordered that the Puget Sound & Willapa Harbor Railway Company be, and the same is hereby, authorized and empowered to construct, maintain and operate its proposed railway at grade over and across the railway tracks hereinafter described, viz:

1. The railway tracks of the South-Bend Chehalis line of the Northern Pacific Railway Company in the northeast quarter (N. E.) of section one (1), township thirteen (13) north, range three (3) West, W. M.

2. The South-Bend-Chehalis railway of the Northern Pacific Railway Company in section one (1), township thirteen (13) north range five (5) West, W. M.

3. That certain industrial railway spur extending from a point of connection with the South Bend-Chehalis line of the Northern Pacific Railway Company in the northwest quarter (N. W.) of section eleven (11) township thirteen (13) north, range five (5) West to a point in the southwest quarter (S. W.) of section two (2), township thirteen (13) north, of range five (5) West, said point of inter-

section being in the said southwest quarter (S. W. ¼) of said section two (2).

35 4. Over and across that certain industry spur extending from a point of connection with the South Bend-Chehalis line of the Northern Pacific Railway Company in the southeast quarter (S. E. ¼) of section one (1), township thirteen (13) north, range five (5) West, southwesterly to the point south of the town of Dryad, said point of intersection being situated in the said southwest quarter (S. W. ¼) of section one (1) aforesaid.

5. Over and across the logging railway constructed and operated by Leudinghaus Brothers, said point of intersection being situated in the town of Dryad in the southwest quarter (S. W. ¼) of section one (1), township thirteen (13) north, range five (5) West, all of said points of crossing being in Lewis county, Washington, and the said points of intersection and crossing being those certain points of intersection and crossing shown on the Exhibits attached to the petitions of the said Puget Sound & Willapa Harbor Railway Company filed herein on applications Nos. 1737 and 1738.

The authority and permission so granted to the said Puget Sound & Willapa Harbor Railway Company to construct and maintain its railway line over and across the South Bend-Chehalis line of the Northern Pacific Railway Company at the points stated in paragraphs 1 and 2, however, is subject to the following conditions:

That there shall be installed for the protection of said crossing an interlocking device at each thereof, such interlocking devices to be so installed as soon as practicable and within four months from the date hereof, unless said time shall, for good reason, be hereafter extended by the further order of this commission, and that said parties be, and they are hereby, instructed and directed to agree upon and submit to the commission plans and specifications for such interlocking plants to the end that the same may be examined and approved.

It is further ordered that in the event that the said railway
36 companies shall be unable to agree between themselves as to an apportionment of the cost and expense of said crossings including the installation, maintenance and operation of said interlocking plants, that then either of said parties may file a further petition herein for the proper apportionment of said costs and expense, it not being the purpose of this commission in this order to adjudicate or determine what, if any, part of the costs and expense of such improvement shall be borne and paid by either of the said railway companies.

Dated at Olympia, Washington, this 30th day of October, A. D. 1914.

PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON,

By ARTHUR A. LEWIS.

FRANK R. SPINNING.

37 EXHIBIT "D."

Before the Public Service Commission of the State of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Stipulation.

Whereas, by its certain order dated October 30, 1914, made in the above entitled proceedings, the public service commission of the state of Washington granted authority and permission to the Puget Sound & Willapa Harbor Railway Company to construct and maintain its railway line over and across the South-Bend-Chehalis line of the Northern Pacific Railway company at grade at the following points, to wit:

(1) In the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, of range three (3) west, W. M. Washington, which crossing is hereinafter referred to as the "Chehalis Crossing."

38 (2) In section one (1), township thirteen (13) north, range five (5) west, W. M. Washington, which crossing is hereinafter referred to as the "Dryad Crossing."

Such permission, however, being subject to the following conditions, viz:

"That there shall be installed for the protection of such crossings an interlocking device at each thereof, such interlocking devices to

be so installed as soon as practicable and within four (4) months from the date hereof, unless said time shall, for good reason, be hereafter further extended by the further order of this commission."

And the said parties, namely, the Northern Pacific Railway Company and the Puget Sound & Willapa Harbor Railway Company, were in and by said order instructed and directed to agree upon and submit to the commission plans and specifications for such interlocking plants to the end that the same might be examined and approved; and

Whereas, the said parties have agreed upon plans for such interlocking plants,

Now, therefore, it is stipulated and agreed between the said Northern Pacific Railway Company, and the said Puget Sound & Willapa Harbor Railway Company that the interlocking plant at the Chehalis Crossing shall be constructed in conformity with the plans shown upon Exhibits A and B hereunto annexed and hereby referred to and made a part hereof, and that the said Dryad Crossing shall be constructed in conformity with the plans hereunto annexed as Exhibits C and D and hereby referred to and made a part hereof; that Exhibit A, being that certain print numbered 6,094, is a correct diagram of the track and signal plan, logging sheet, and dog chart pertaining to the interlocking device at said Chehalis Crossing, and Exhibit B, being that certain plan numbered 4,242, is a correct circuit plan pertaining to the interlocking device at said Chehalis Crossing; that Exhibit C, being that certain print numbered 6,095, is a correct diagram of the track and signal plan, logging sheet and dog
39 chart pertaining to the interlocking device at said Dryad Crossing; and Exhibit D, being that certain plan numbered 4,243, is a correct circuit plan pertaining to the interlocking device at said Dryad Crossing.

It is further stipulated and agreed between the parties hereto that the said plans may be approved as satisfactory plans for said interlocking plants.

GEO. T. REID,
Attorney Northern Pacific Railway Company.
F. M. DUDLEY,
Attorney Puget Sound & Willapa Harbor Railway Company.

40 EXHIBIT "Y."

Before the Public Service Commission of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast (N. E.) quarter of section one (1), township 13 (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range 5 west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Findings of Fact and Conclusions.

The above entitled matter came on for hearing before the Public Service Commission of the State of Washington, in the city of Tacoma, on March 26, 1915, F. M. Dudley, Esq., and F. M. Barkwill, Esq., appearing for the Puget Sound & Willapa Harbor Railway Company, Geo. T. Reid, Esq., L. B. da Ponte, Esq., and J. H. Quick, Esq., appearing for the Northern Pacific Railway Company, the Commission does now make the following findings of fact and conclusions;

By stipulation of the parties and the consent of the Commission these causes have been consolidated. Originally these causes came before the Commission upon the petition of the Puget Sound and Willapa Harbor Railway Company, known in the proceeding as the Willapa Harbor Company, whereby the said last named company petitioned for the consent of the Commission to cross the line of
41 the Northern Pacific Railway Company at grade. On October 30th, 1914, the Commission made findings of fact and order in the above entitled causes, which findings and order are by reference made a part hereof.

By the provisions of these orders the Willapa Harbor Company was authorized to maintain and operate its railway at grade over and across the railway tracks of the South Bend-Chehalis line of the Northern Pacific Railway Company in the northeast quarter of Section one (1), township thirteen (13) north, of Range 3 West W. M.

The South Bend-Chehalis line of the Northern Pacific Railway Company in section 1, township 13 North, Range 5 West, W. M.

That certain industrial railway spur extending from the point of connection with the South Bend line of the Northern Pacific Railway Company in the northwest quarter of Section 11, township 13 North Range 5 West, to a point in the southwest quarter of section 2, township 13 North, range 5 West, said point of intersection being in the said southwest quarter of said section 2.

Over and across that certain industrial spur extending from the point of connection with the South Bend line of the Northern Pacific Railway Company in the southwest quarter of section 1,

township 13 north, range 5 West, southwesterly to a point south of the town of Dryad, said point of intersection being situated in the said southwest quarter of section one aforesaid.

Over and across a logging railway constructed and operated by Luedinghaus Bros. said point of intersection being situated in the town of Dryad in the southwest quarter of Section one, township thirteen north, range five West, W. M.

All of said points of crossing being in Lewis County, Washington.

The authority and permission so granted was subject to the conditions that there should be installed for the protection of the said first two crossings herein mentioned interlocking devices, such interlocking devices to be so installed as soon as practicable, and
42 the carriers interested were instructed and directed to agree upon and submit to the Commission plans and specifications for such interlocking plants. It was specifically provided in the orders referred to that the Commission did not at that time adjudicate or determine what, if any, part of the costs and expenses of such interlocking devices should be borne by either of the railway companies.

In so far as the proceedings before the Commission are concerned it does not appear that there are any contentions between the railway companies concerning any matters other than the apportionment of the costs of constructing and maintaining the interlocking devices above referred to. In fact, it is specifically stated in the petitions of the Willapa Harbor Company "That the difference between the said parties relates only to the installation of interlocking plants at said crossings."

A stipulation has been filed by the railway companies evidencing the fact that the contentions before this Commission now relate only to the apportionment of the costs of the interlocking devices now constructed, on the crossings referred to in Cause No. 1737, located in the Northeast quarter of Section 1, township 13 north, Range 3 West, in Lewis County, Washington, and the crossing referred to in Cause No. 1738, situated in section 1, township 13 North, Range 5 West.

It appears from the evidence before the Commission, and the Commission finds:

1. That for some years prior to the construction of the Puget Sound & Willapa Harbor Company's line, the Northern Pacific Railway Company had been operating its railway line known as the South Bend-Chehalis line, in Lewis County, Washington.

2. That prior to the construction of the line of the Willapa Harbor Company, there was no necessity for interlocking devices at the points concerning which the dispute now before the Commission has arisen, as the crossings under consideration did not exist.

43 3. That the installation of interlocking plants is primarily to avoid the cost and delays involved in stopping trains at grade crossings where such plants are not installed, and to secure safety in operation.

4. That aside from the general benefits accruing to the public from the construction and maintenance of the Willapa Harbor Com-

pany's railway line, no benefit accrues to the Northern Pacific Railway Company by the maintenance of said crossings.

5. That the necessity of the maintenance of said crossings and interlocking devices arises by reason of the construction and operation of the line of the Willapa Harbor Company at those particular points, and that except for such construction and operation by the said Willapa Harbor Company, there would be no occasion for the maintenance of said crossings and interlocking devices.

Wherefore the Commission concludes that it would be unreasonable to require the Northern Pacific Railway Company to bear any portion of the cost of construction and installing and maintaining the interlocking devices at the crossings above referred to, and an order of the Commission will be entered in conformity with the Findings and conclusions herein set forth.

Witness the Public Service Commission of Washington this 22nd day of December, 1915.

THE PUBLIC SERVICE COMMISSION OF WASHINGTON,

By C. A. REYNOLDS, *Chairman.*

ARTHUR A. LEWIS, *Commissioner.*

FRANK R. SPINNING, *Commissioner.*

Attest:

J. H. BROWN, *Secretary.*

44 EXHIBIT Z.

Before the Public Service Commission of Washington.

No. 1737.

No. 1738.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast (N. E.) quarter of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range 5 west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

Order.

The above entitled matter came on for hearing before the Public Service Commission of the State of Washington, in the City of Tacoma, March 26th, 1915, F. M. Dudley, Esq., and F. M. Barkwill, Esq., appearing for the Puget Sound & Willapa Harbor Railway Company, George T. Reid, Esq., L. B. da Ponte, Esq., and J. H. Quick, Esq., appearing for the Northern Pacific Railway Company. Now, at this time, the Commission having heretofore made and entered its findings of fact and conslusions,

It is hereby ordered that the Puget Sound & Willapa Harbor Railway Company shall maintain for the protection of the crossings hereinafter mentioned, adequate interlocking devices, and that such interlocking devices be maintained by and at the expense of the said Puget Sound & Willapa Harbor Railway Company, it being understood that the said interlocking devices have been heretofore installed.

The Public Service Commission of the State of Washington will not require the Northern Pacific Railway Company to pay any portion of the expense of installing or maintaining the said interlocking devices.

The crossings to which this order is applicable, are located at the following points, viz:

The crossing referred to in proceeding No. 1737, in the Northeast quarter of section One (1), township thirteen (13) North, Range three (3) West, W. M. in Lewis County, Washington,

The crossing referred to in proceeding No. 1738, in section one (1) township thirteen (13) North, Range 5 West W. M.

Witness the Public Service Commission of Washington this 22nd day of December, 1915.

THE PUBLIC SERVICE COMMISSION OF WASHINGTON,

By C. A. REYNOLDS, *Chairman.*
ARTHUR A. LEWIS, *Commissioner.*
FRANK R. SPINNING, *Commissioner.*

Attest:
J. H. BROWN, *Secretary.*

Endorsed: "Recd. & Filed Jan. 13, 1916. B. S. Gage, Clerk, A. Tripp, Deputy."

46 In the Superior Court of the State of Washington, Holding Terms in and for the County of Lewis.

No. 6428.

THE STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Order for Issuance of Writ of Review.

Upon reading the verified petition of the relator, Puget Sound & Willapa Harbor Railway Company, filed herein,

It is ordered, that an alternative writ of review, in the form prescribed by law and containing a copy of the verified petition of the said petitioner for such writ, be issued by the clerk of this court, under the seal thereof, to the above named defendant, Public Service Commission, directing it to certify fully to this court, at the Court House, in the City of Chehalis, Lewis County, Washington, on or before the 7 day of Feb. A. D. 1916, at 2 o'clock P. M. of said day, a full and complete transcript of all of the proceedings had before the said Commission, or any member thereof, upon the petition of the Puget Sound & Willapa Harbor Railway Company, for an apportionment between said Railway Company, and the said defendant, Northern Pacific Railway Company, of the costs of construction and of the expense of maintenance and operation of interlocking plants required to be installed at two certain crossings of a railway track of the defendant, Northern Pacific Railway Company, by the railway track of the relator, Puget Sound & Willapa Harbor Railway Company, one of said crossings being located in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north,
of range three (3) West, in Lewis County, Washington, and
47 the other of said crossings being located in section one (1), township thirteen (13) north, of range five (5) West, in Lewis County, Washington, said petition being filed in that consolidated proceeding numbered 1737 and 1738 and entitled:

"In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M."

Such transcript to include the said petition and all stipulations, papers and pleadings, filed by the parties to said proceeding, the record of all testimony taken and preserved in writing at the hearing before the said Commission on said petition and the record of all the acts and proceedings of said Public Service Commission taken and had in said proceeding, and the findings, conclusions, and order of said Commission made and entered in said proceeding on, towit: the 22nd day of December, A. D. 1915, and any and all other files and records in said proceeding, to the end that the same may be reviewed by this court, or in the alternative that the said defendant show cause at said time and place why said return should not be made.

It is further ordered that the said defendant, Northern Pacific Railway Company, be required and directed, in and by said writ, to show cause why the relief prayed for by the said relator should not be granted.

48 Done in open court this 13 day of January, A. D. 1916.

A. E. RICE,
Judge of said Court.

Endorsed: "Recd. & Filed, Jan. 13, 1916. B. S. Gage, Clerk, J. C. Dallavo, Deputy."

49 STATE OF WASHINGTON,
County of King, ss:

F. M. BARKWILL, being first duly sworn on oath deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of twenty one (21) years and competent to be a witness in the hereinafter entitled cause; that on the 13th day of January, A. D. 1916, in the city of Olympia, Washington, he personally served the writ of Review and a true and correct copy of the petition for writ of review, issued out of the Superior Court of the State of Washington, in and for Lewis County, in that certain cause wherein the State of Washington, upon the relation of the Puget

Sound & Willapa Harbor Railway Company, a corporation is plaintiff and the Northern Pacific Railway Company, a corporation and the Public Service Commission of Washington are defendants, said cause being number 6428 of the number of causes on file with the Clerk of the said Superior Court of said County, by delivering to and leaving with J. H. Brown, the original copy of said writ of review and a true and correct copy of said petition for writ of review, that the said J. H. Brown is the secretary of said defendant, Public Service Commission of Washington. This affidavit is attached to a true and correct copy of the original writ of review, issued out of said court and a true and correct copy of the petition on file with said court and of the writ of review and copy of petition for writ of review served upon said J. H. Brown.

F. M. BARKWILL.

Subscribed and sworn to before me this 17th day of January, 1916.

[NOT. SEAL.] FLOYD H. WILLIAMS,
Notary Public in and for said County and State,
Residing at Seattle, therein.

50 In the Superior Court of the State of Washington for Lewis County.

STATE OF WASHINGTON,
County of Lewis, ss:

I, T. C. Foster, Sheriff of Lewis County, Washington, do hereby certify that I received the annexed writ of Review and Petition on the 13th day of January, A. D. 1916, and on the 13th day of January A. D. 1916, I duly served the same upon the within named defendant Northern Pacific Railway Company, a corporation, by delivering a true copy thereof, certified to be such by —— —— attached to a true copy of the complaint, herein, certified to be such by —— —— to C. P. Fulton, Agent of said corporation, the said defendant, personally at Chehalis, in said County, Washington.

Dated at Chehalis, this 13th day of January, A. D. 1916.

T. C. FOSTER,
Sheriff of Lewis County, Washington,
By S. R. JACKSON,
Deputy Sheriff.

To Serving 1...$ .60
To Mileage.....$ .20

$ .80

51 In the Superior Court of the State of Washington, Holding Terms in and for the County of Lewis.

No. 6428.

THE STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Writ of Review.

The State of Washington to the Northern Pacific Railway Company, a corporation, and to the Public Service Commission of the State of Washington, the defendants above named, Greeting:

Whereas, it appears to the above entitled court by the verified petition of the above named relator, Puget Sound & Willapa Harbor Railway Company, a corporation, that in a certain proceeding lately pending before the Public Service Commission of Washington upon the petition of the said Puget Sound & Willapa Harbor Railway Company for an apportionment between said Railway Company and the said defendant, Northern Pacific Railway Company, of the costs of construction and of the expense of maintenance and operation of interlocking plants required to be installed at two certain crossings of a railway track of the defendant, Northern Pacific Railway Company, by the railway track of the relator, Puget Sound & Willapa Harbor Company, one of the said crossings being located in the northeast quarter (N. E. ¼) of section one (1) township thirteen (13) North, of range three (3) West, in Lewis County, Washington and the other of said crossings being located in section one (1), township thirteen (13) north, of range five (5) West, in
52 Lewis County, Washington, which said petition was filed in that consolidated proceeding numbered 1737 and 1738, entitled:

"In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M."

the said Public Service Commission made and entered a certain order dated December 22, 1915, and in said proceeding and in making an entry of said order committed manifest error to the prejudice of the relator, and that there is no appeal or other plain, speedy or adequate remedy, and that the said relator is entitled by law to this writ of review, and the court being therefore willing to be certified of all of the said proceedings;

Now therefore, we command you, the said Public Service Commission of Washington, that you certify and send to this Court at the Court Room in the city of Chehalis, in Lewis County, Washington, on or before the 7th day of February, A. D. 1916, at the hour of 2 o'clock P. M., annexed to this writ a transcript of all of the proceedings had before you, or any member of your Commission, upon the said petition of the Puget Sound & Willapa Harbor Railway Company, such transcript to include the said petition and all stipulations, papers and pleadings filed by the parties to said proceeding, the record of all testimony taken and preserved in writing at
53 the hearing before you on said petition and the record of all of your acts and proceedings taken and had in said proceeding and the findings, conclusions and order made and entered by you in said proceeding on to wit: the 22nd day of December, A. D. 1915, and any and all other files and records in said proceeding, to the end that the same may be reviewed in said court, and that said court may further cause to be done thereupon what appears of right and justice should be done, or in the alternative that you show cause at said time and place why such return should not be made.

And we further command you, the said Northern Pacific Railway Company, to appear and show cause, if any you have, at said time and place, why the relief prayed for by the said relator should not be granted.

Herein fail not and have you then and there this writ.

Witness the Honorable A. E. Rice, Judge of said Court, at Chehalis, Lewis County, Washington, and the seal of said Court this 13th day of January, A. D. 1916.

[SEAL.] B. S. GAGE, *Clerk*,
By J. C. DALLAVO, *Deputy*.

Endorsed: "Recd. & Filed Jan. 18, 1916. B. S. Gage, Clerk."

54 In the Superior Court of the State of Washington, Holding Terms in and for the County of Lewis.

No. 6428.

THE STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Stipulation.

It is hereby stipulated by and between the parties hereto by their respective attorneys:

1. That the allegations of the 1st, 2nd, 3rd, and 4th, paragraphs of the relator's petition herein are true, and that the exhibits thereunto attached as Exhibit- "W," "X," "Y" and "Z" and of the Exhibits "A," "B," "C" and "D," attached to and constituting a part of Exhibit "X" are true and correct copies of the original papers of which they purport to be copies.

2. That it shall not be necessary, unless the court shall deem and consider such papers, or any thereof, necessary to a determination of the questions arising upon the petition of the relator herein, for the Public Service Commission to certify or transmit to said court as a part of the record the original applications filed by the Puget Sound & Willapa Harbor Railway Company for permission to make the grade crossings referred to in the petition, or any of the records or proceedings thereon prior to the filing of the petition for the apportionment of the costs of crossings, attached to the petition herein as Exhibit "W," nor to certify or transmit to said court a copy of said Exhibit "W," or any of the exhibits attached to the petition herein or to certify or transmit to said court any of the proceedings or records save and except a transcript of the testimony and
55 proceedings taken and had before the said Commission at the hearing before it on to wit: March 26, 1915.

It is further stipulated and agreed that the prints of plans and specifications attached to and made a part of Exhibit "D" of the petition herein, are true and correct copies of the prints of such plans and specifications which were referred to by the witnesses in their testimony given at said hearing of March 26, 1915, and that the Public Service Commission need not certify to or make, as a part of its return, any further copies of said prints.

3. It is further stipulated and agreed that this proceeding may be heard and determined upon the files herein, this stipulation and the transcript to be returned to and filed with the said court by the Public Service Commission pursuant to the provisions of this stipulation, and such other files and records of the Public Service Commission

as the court may require to be returned to it, if it shall be of the opinion that such other or further files or records are essential to a proper determination by it of the questions involved in this proceeding.

Dated this 17 day of January, A. D. 1916.

F. M. DUDLEY AND
F. M. BARKWILL,
Attorneys for Plaintiff.
GEO. T. REID,
J. W. QUICK &
L. B. DA PONTE,
Attorneys for Defendant Northern Pacific Railway Company.
SCOTT Z. HENDERSON,
Attorneys for Defendant Public Service Commission.

Endorsed: "Recd. & Filed Feb. 21, 1916. B. S. Gage, Clerk, A. Tripp, Deputy."

56 In the Superior Court of the State of Washington, Holding Terms in and for the County of Lewis.

No. 6428.

THE STATE OF WASHINGTON on the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Defendants.

Return to Writ of Review.

Comes now the Public Service Commission of Washington, one of the above named defendants and returns and files herewith a full, true and correct transcript of the testimony and proceedings taken and had before said commission at the hearing held on March 26th, 1915, in those certain causes lately pending before said Commission entitled:

No. 1737.

No. 1738.

"In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M."

57 This return to the writ of review issued in the above entitled proceeding is made in conformity with stipulation in the above entitled proceeding No. 6428, dated January 17th, 1916, and signed by Messrs. F. M. Dudley, F. M. Barkwill, attorneys for plaintiff, Messrs. George T. Reid, J. W. Quick, and L. B. da Ponte, attorneys for defendant, Northern Pacific Railway Company and Mr. Scott Z. Henderson, attorney for defendant, Public Service Commission.

Dated at Olympia, Washington, February 7th, 1916.

W. V. TANNER,
Attorney General;
SCOTT Z. HENDERSON,
Assistant Attorney General,
Attorneys for Defendant Public Service Commission of Washington.

58 Public Service Com. Received Apr. 1, 1915. Ans. by —— ——.

Duplicate.

Before the Public Service Commission of the State of Washington.

Cases #1737 and 1738.

PUGET SOUND AND WILLAPA HARBOR RY. CO., Petitioner,

v.

NORTHERN PACIFIC RY. CO., Respondent.

Transcript of Testimony.

Hearing had at Tacoma, March 26, 1915.

Appearances:

F. M. Dudley, Esq., Appearing for Petitioner.
Geo. T. Reid, Esq., Appearing for Respondent.

Following proceedings had.
Docketed 1837-1738.

59 Mr. Dudley: I will offer in evidence the stipulation which has been signed by Judge Reid and myself. The stipulation has attached to it as exhibits the original contract between the two railway companies, by which the hearing was terminated on the question of necessity; the findings of fact and conclusions and order of the Public Service Commission; the last stipulation between the railway companies, agreeing that these plans are satisfactory; The copies of the findings of fact and conclusions of the Commissioners here were made up from my office copies, and they show that apparently these orders were made and entered "this blank day of July A. D. 1914." As a matter of fact that date is incorrect, and I think it was about the 30th day of October.

Mr. Reid: I think that was the date of the hearing, July, 1914.

Mr. Dudley: Yes, and after the hearing I prepared and submitted these findings and conclusions to the court on that day, but there was delay in signing them, so that they were not actually signed up until later, and I was going to suggest that the Commission from their original files ascertain the correct date and insert it, so that this exhibit will show the true date of the entry of the order.

Mr. Reid: There is no objection to the stipulation being received.

The Chairman: It can be admitted.

Thereupon said stipulation was marked as Petitioner's Exhibit "A."

60 Mr. Reid: The respondent offers in evidence a stipulation of counsel in this case, dated this day, the 26th day of March.

Mr. Dudley: The stipulation preserves the right to object to the materiality or competency of the facts stipulated. We will admit the truth of it, but we object to it as incompetent, irrelevant and immaterial to the issues.

The Chairman: In what way would this commission be bound by the usage and custom of the railroads?

Mr. Reid: I do not think it is binding on the commission.

The Chairman: How is it material?

Mr. Read: Necessarily the commission is not bound by it, but it is certainly a fact that the commission, I believe, would want to know. If there has been a uniform practice among railroads as to the enforcement of costs in a case of this character, and if they go ahead and install these interlocking devices from time to time without bothering the commission about it and there is a uniform practice as to the division of the cost, I think it is a fact the commission ought to know, and therefore logically relevant.

The Chairman: Let it be admitted.

Thereupon said stipulation was marked as Respondent's Exhibit "One."

Mr. Dudley: We ask exception to the admission of it.

61 LYNN WALLACE SMITH, a witness called by the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Dudley:

Q. Will you state your full name?

A. Lynn Wallace Smith.

Q. And your occupation?

A. Occupation, assistant signal engineer, Chicago, Milwaukee & St. Paul Railroad.

Q. Mr. Smith, I want to call your attention to the blue print No. 6094, which is a part of Exhibit D attached to the petitioner's Exhibit A, and I wish you would explain that diagram to the court?

A. This plan represents a diagram of the tracks and locations of signals and of derails for the interlocking plant at the crossing between the Northern Pacific Company, and the Puget Sound & Willapa Harbor, just west of Chehalis. The various symbols show the different functions, and each has a number.

Q. Now, Mr. Smith, I will call your attention to this table by which you charge certain levers in units to the Willapa Harbor and certain levers in units to the Northern Pacific. First explain to the Commission what you mean by levers?

A. It is a term used to determine the value of the various component parts of the interlocking plant, and this table of units takes each of those component parts, lists them separately and shows the value in units as agreed upon by the signal engineers of the two companies interested.

Q. Is that valuation in units you agreed on there the recognized valuation by any association or railway associations?

62 A. It is not—there is a recommended valuation of component parts, but it is rarely ever conformed to consistently in cases of this kind, due to the fact that special conditions arise and different signal engineers have slightly different ways and views as to what these values should be. So that it is customary to agree on the value in units of the component parts at the time the plans are prepared, which was done in this case.

Q. This was agreed upon between the signal engineers of the two railway companies?

A. Yes, the plans were approved and signed by the two signal engineers.

Q. Now, under the head of "signals" in this table, what have you there?

A. This chart here shows the number of levers which operate signals on the Puget Sound & Willapa Harbor line, and also the number of levers which operate signals on the Northern Pacific, and their value in units.

Q. I notice that you have two levers in each case, and the value of the units of the Willapa Harbor is six, and of the Northern Pacific is seven. Will you explain why that is?

A. You will note that the plans show that the two signals, No.

12 and No. 3, on the Northern Pacific line are shown to have two arms. One is operative, the other is fixed. It was agreed that the addition of this fixed arm should be given a value of one-half unit. This was demanded by the Northern Pacific to be installed as consistent with their standards.

Q. There is no corresponding double blade on the Willapa Harbor signals?

A. No, sir, there is no fixed blades on the corresponding
63 signals of the Willapa Harbor line, and for the reason that they have a smaller value in units.

Q. Now derails with bars, what is that?

A. "Derails and Bars," yes sir.

Q. That has two levers and four units to each company?

A. Yes.

Q. "Time locks" you have in your table there, 1 time lock?

A. There is one lever operating one time lock, which serves both companies equally and was not given any value in units.

Q. Now, under the head of "annunciators," I notice that you have two units charged to the Northern Pacific there and nothing charged to the Willapa Harbor. Will you explain that?

A. The Northern Pacific Company demanded that annunciators be installed upon their line, and the Milwaukee Company or the Willapa Harbor didn't consider it necessary. Consequently the addition of this function was given a value of two units and charged to the Northern Pacific Company.

Q. This annunciator device is not installed on the Willapa Harbor line?

A. No, sir.

Q. But is on the Northern Pacific?

A. Yes.

Q. Now in the lower three columns, under the head "working," those figures are simply totals of the units and levers above?

A. Yes, sir.

Q. And there are "Spare spaces," and there are three levers there in the totals, but that is not charged to either company.

A. No, sir.

Q. The only difference in units between the two companies relates entirely to the annunciators and the fixed blades?

4 A. The only difference?

Q. Yes.

A. Yes, sir, it is.

Mr. Spinning: Where are the fixed blades on here (referring to blue-print).

A. The fixed blades are shown here. Fixed means not operative and not working, so that they would not show under the column of levers and as operating functions.

Q. Now this other diagram, in reference to the other crossing, No. 095, that is a corresponding diagram, but applicable to the crossing at Dryad?

A. Yes.

Q. And you have the same diagram or table here giving the number of levers and units chargeable to the companies, have you?

A. Yes, sir.

Q. And the same discrepancy in that diagram that occurs in the other?

A. Yes.

Q. That is as an extra charge for the Northern Pacific for the annunciators and the fixed blades?

A. That is correct.

Q. And with that exception everything is divided evenly between the two companies?

A. Yes.

Q. This is a larger interlocking plant, isn't it, containing more units that the one at the Chehalis crossing?

A. No, sir, the mumber of the units are the same.

Q. The number of levers are greater?

A. They have two levers more.

Q. Will you explain why that is?

65 A. In this case we have a special condition to contend with, in that a bridge comes within the interlocking limits, which made it impracticable to place de-rails at the usual distance from the crossing. It was agreed to use deflecting switches to take the place of de-rails in that case, which effects both lines equally, and the use of a switch under those conditions has a special locking device which is called a "facing point lock," and it requires one facing point lock for each deflecting switch, making it necessary to have two more operative levers than were required on the Chehalis plant, so that there is no discrepench or difference in the charges assigned.

Cross-examination.

By Mr. Reid:

Q. Mr. Smith, how much would it cost approximately to put these fixed blades on the mast?

A. Well, it is customary to estimate the cost of an additional unit to a plant between four and five units——

Q. (Interrupting.) But that is not what I asked you. I asked you how much it would cost in dollars and cents to put a fixed blade on a mast?

A. Well, the actual cost of the blade and the casting I should estimate would be fifteen to twenty dollars.

Q. Now, say that it was $15. Do you think that when there are two fixed blades that they ought to count as a unit and the company that has the fixed blades should be charged, in this case, one twenty third (1/23) of the whole cost of constructing, maintaining and operating the whole interlocking plant, on account of two $15 fixed blades?

A. Well, those two fixed blades must have lights main-
66 tained on them, and there is an additional expense in that way to the maintenance of the plant.

Q. You then want the commission to understand you contend that

those two blades which would cost $15 a piece, and the expense of maintaining lights on them, should count as one unit in this plant, or that you should put upon the Northern Pacific Railroad Company one-twenty-third of the whole cost of construct- and maintaining and operating the interlocking plant,—on account of those two fixed blades?

A. That is the practice that has been followed in distributing the cost.

Q. Do you think it is a fair practice in this case?

A. Well, it is fair so far as maintenance is concerned.

Q. Maintenance of the whole interlocking plant?

A. Well, I cannot say that the fixed blade would take its proportion of the cost of the whole interlocking plant as a half a unit.

Q. You know it would not so far as cost is concerned, don't you?

A. It would not so far as cost of construction is concerned.

Q. Or of maintenance either?

A. Well, I question that a little bit on its maintenance, because you have two fixed blades to maintain that are inoperative as compared with one that is operative.

Q. The fixed blade is not connected with the lever in any way, shape or form, is it?

A. No.

Q. It is never thrown. It simply is a blade that sticks out there until it rusts or rots, isn't it?

A. It is maintained.

Q. It is never used. It simply stands stationary as a fixed
67 blade to signify that that is an interlocking crossing?

A. That's the idea, yes, sir.

Q. You say that Mr. Christofferson agreed that the fixed blade should be counted as half a unit in the construction, maintenance and operation of this whole plant?

A. That is my understanding, he approved the plans.

Q. He approved the plans, but do you say that he ever said to you or any person that those two fixed blades should represent one unit in the division of the whole cost of constructing, maintaining and operating that plant?

A. I haven't any good reason to assume otherwise.

Q. Did he ever say so to you?

A. No, sir.

By Mr. Spinning:

Q. Mr. Smith, one question to perhaps help me out personally. Are you seeking to divide or to adjust this matter upon the theory that one company shall be responsible or provide for a certain number of units and the other company another certain number without regard to the cost of these respective units, those various units?

A. No, sir, I think it should be with respect to the cost, maintenance and operation.

Q. You have proceeded upon that theory in this distribution, have you?

A. Yes. I was not the instrumentality in approving these plans. They were approved afterwards by officials higher than I am.

By Mr. Reid: I don't think Mr. Smith intended to say to the commission he believed that was a fair way or jusy way of adjusting it. We want Mr. Smith to be clear in the record on that, either he does or does not.

68 Mr. Dudley: I do not think Mr. Smith has to express any opinion on that. That is properly left to the legal department to make the contention as to that. Mr. Smith is called simply to explain the map.

Mr. Reid: He answered the question of the commission. I don't think he answered it the way he intended to and I wish the commission would clear it up.

The Chairman: The Puget Sound & Willapa Harbor, that is the Milwaukee, is the new road, isn't it?

A. Yes.

Q. The Northern Pacific was there and the Milwaukee desired to cross its tracks?

A. Yes.

The Chairman: The statute speaks of the new road. That means the Milwaukee in this case.

The Witness: The Puget Sound & Willapa Harbor.

By Mr. Reid:

Q. Calling the two fixed blades one unit, so you say that it costs as much to install one unit consisting of two fixed blades as it does to construct an entire unit that consists of a de-rail operated by a lever?

A. No, sir.

By Mr. Spinning:

Q. Then there is no effort or intention on the part of the engineers to establish these units of equal value, or is that your purpose?

A. As I understand it those two fixed blades have some value in the cost of construction and maintenance, and for that reason it was agreed that they should each take the value of a half unit in this case.

69 Q. Regardless of their cost to the cost of the other units?

A. Yes, sir.

By Mr. Reid:

Q. When you say that it was agreed, you are going entirely by this blueprint. You are not attempting to say that is anything that Mr. Christofferson ever said to you?

A. I am going by the fact that the plans are approved and signed by the various officials.

Redirect examination.

By Mr. Dudley:

Q. The plans when they were submitted to the Northern Pacific signal department contained this division of units as they appear on the exhibit?

A. Yes.

Q. And they were examined and finally approved by the North ern Pacific Signal Department officials?

A. Yes.

Witness excused.

Mr. Dudley: That is all the testimony we have.

Mr. Reid: First I wish to state in the record that I do not agree to the division as shown upon this map. I do not agree that our engineers ever agreed to any such division, and I wish to distinctly repudiate any agreement, if they did make it, as being beyond their authority, and to reserve the right, if on considering the case the Commission feels that it is an important point, to call Mr. Christofferson, the engineer who O. K.'d these plans. He is the Northern Pacific signal engineer, but lives in St. Paul. So that he is not available.

70 L. M. PERKINS, a witness called by the respondent, being duly sworn, testified as follows:

Direct examination.

By Mr. Reid:

Q. What are your initials, Mr. Perkins?

A. L. M. Parkins.

Q. And your position?

A. Engineer of maintenance and way of the Northern Pacific railway.

Q. Will ask you to look at the exhibit that has been introduced showing the interlocking plant in course of construction at Dryad, and ask you to state, in the division of units between the Northern Pacific and Willapa Harbor road as shown upon that map, how it happens that the Northern Pacific has thirteen units assigned to it, as against ten units assigned to the Willapa Harbor road?

A. The tabulation which show the relative number of units counts two fixed blades, each as one half unit, to the Northern Pacific, and there is no corresponding function on the Willapa Harbor, making a difference of one unit. Also counts an annunciator with an indication from each direction, as two units.

Q. Now tell the commission what this annunciator is.

A. The annunciator consists of a short stretch of bonded track so that a train passing over it will ring a bell in the tower, indicating to the signal man that there is a train approaching, and he can be prepared to have the route line and let that train pass.

Q. Is this announciator in any way connected with the levers?

71 A. It is not.

Q. Is it in any way connected with the lighting system?

A. It is not.

Q. It consists simply, as I understand you, of bonded rails so that when the train is within the bonded zone it will ring a bell in the tower?

A. Yes. Takes two rails from the bonded strip to the tower to complete that circuit.

Q. Now as to the cost, what is the cost of installing the annunciators? Would the cost of installing this annunciator be equal to two-twenty-thirds of the entire cost of constructing the interlocking plant?

Mr. Dudley: I object to that as incompetent, for this reason: The cost of the interlocking plant includes many matters; for example, the tower which is necessarily common to all of the units. If you take the actual cost of the annunciator, or if you take out the actual cost of each and every separate unit and add them together you will not have the cost of interlocking plant, because there are certain matters like the tower which are common to all, and therefore the question brings up an improper proportion. As to whether the cost of the annunciator is one-twenty-third of the cost of the entire plant is immaterial and incompetent. There are so many units; the entire cost of the entire plant must be proportioned between these units.

The Chairman: Mr. Dudley, those are units that are peculiar to the Northern Pacific line. In other words, it seems to

72 me that the proportion that they bear to the rest of the cost of the plant would be material to this hearing. Your objection will be overruled.

Mr. Dudley: Allow us an exception.

The Chairman: Exception allowed.

A. It would not.

Q. Why are those annunciators put in? Are they a necessary part of the plant or are they an additional protection, or what is their function?

A. There function is to indicate to the signal man that a train is approaching. It is generally considered the primary object of an interlocking plant is to prevent -rains from passing without stopping. The purpose of annunciators is to aid in that function.

Q. As I understand, it is a mere additional protection?

A. It is an additional protection.

Q. Now about the fixed blades, how much would it cost to put those fixed blades on?

A. It would cost somewhere around, for the two of them around 30 or 40 dollars.

Q. And what is the function of those fixed blades?

A. They are to indicate that the signal is a stop and stay signal,

as distinguished from an automatic block signal with a stop and proceed limitation, after a short wait.

Q. Then it is also an additional protection is it?

A. It is an additional protection to distinctly indicate what the signal is.

Q. Is there any fixed principle, Mr. Perkins, that is generally adhered to in assigning units, or is it a matter of judgment in each particular case?

A. Why, there is a general principle in interlocking plants on a lever basis,—number of levers,—which is quite commonly used and followed, and there is a recommended practice which is followed to a very large extent now days; been adopted by the American Railway Signal Association and also by the American Railway Engineering Association.

Q. What is the principle followed on the lever basis or function basis?

A. That fixes a certain value to the different functions. It assigns a value to operating functions only, or operating units.

Q. These two crossings in question are merely cases of one rail road crossing another without any switches or any other rails connected up with the interlocking plant, are they not?

A. No complication; straight crossing interlocking.

Cross-examination.

By Mr. Dudley:

Q. These two functions, the annunciators and the fixed blades were not included in the operative functions, or would you include the annunciators in the operating functions?

A. The fixed blades are not an operating function at all. The annunciator is, to a limited extent, an operative function, because he——(Interrupted.)

Q. The cost of the annunciator function is about the same as the other average functions?

A. No.

Q. It is not?

A. No.

Q. What *is* the difference?

A. Why, roughly the two annunciators—this is very roughly—would perhaps cost about the same as another function.

By the Chairman:

Q. About what would the annunciator cost, in round figures, approximately?

A. In the neighborhood of, the two of them in the neighborhood —I didn't make any check on the Dryad plant, but those two on the Chehalis plant four or five hundred dollars additional.

Q. Two of them would cost about one and a half of any other function, wouldn't they?

A. I would say more closely that the two of them would cost about what one of the functions would, perhaps a trifle more. I do not think it would be quite one and a half.

Q. You think it would be as low as that?

A. About that, yes.

Q. In maintenance there would be an additional cost by reason of this additional function or these additional functions?

A. There would be a slight additional cost, yes.

Q. There would be the cost of maintaining the fixed blades?

A. Yes.

Q. And the cost of repairs and maintenance of the annunciators?

A. There would be such as that, yes, sir.

Q. And how much that would be experience only would prove?

A. I am personally not in a position to use very reliable figures as to what that would be.

Witness excused.

Mr. Reid: That is the only testimony we care to introduce.

75 *Rebuttal.*

LYNN WALLACE SMITH, being recalled by the respondent, testified as follows:

Direct examination.

By Mr. Dudley:

Q. Mr. Smith, what in your opinion is the value of the annunciator function as compared with the other functions?

A. Our estimate on this proposition as to the cost of the annunciators is $250 each, and a working leaver,—the lever itself—$250 each.

Q. Then it has the same value as the other functions?

A. Yes. That is caused principally by the amount of line wire that is necessary to be constructed to these annunciators, which are placed a mile to a mile and a half from the plant, and additional cross arms and other material that goes in to make up the annunciator installed complete.

Q. In your experience what is the cost of the maintenance of this annunciator device and its functions?

A. It is equal to any other function in the plant.

Cross-examination.

By Mr. Reid:

Q. You are assigning the division of the cost of the tower on a unit basis?

A. The tower is figured separately in this estimate that I am quoting now.

Q. But if this cost of construction of an interlocking plant were divided upon the basis recommended by your company the cost of

this tower would be assigned equally to the annunciators and
76 to the fixed blades the same as it would to the others?

A. Yes, it is assigned equally to the annunciators and to the fixed blades, as estimated, yes.

Q. And also the cost of the men who operate the plant, the salaries of the men who operate the plant?

A. Yes.

Q. They would not have a thing to do with the annunciator?

A. Except the annunciators govern those men to the Northern Pacific's advantage.

Q. It is an additional protection to call their attention to the approach of trains?

A. Yes.

Q. And the whole expense of these units are assigned although the men have nothing to do in the way of working levers to operate the annunciators or fixed blades?

A. Well, the annunciators work automatically.

Q. And the fixed blades are stationary?

A. Yes.

Q. The men haven't a thing to do with the fixed blades other them to keep the lights burning?

A. Well, the annunciators require a maintenance expense the same as the other.

Q. But I am asking about the operating expense, the salary of the tower employees.

A. The operators do not govern the annunciators, but the annunciators govern the operators.

Q. Wake them up when they are asleep?

A. Yes, prevent them from failing to stop a train.

Q. Now in giving the cost of these levers at $250, did that include the labor and material, or just the material?

77 A. That includes labor and material. No, I take that back. That includes material only. The labor is figured separately.

Q. So that it is not true that the annunciators would cost as much as the levers, if you were figuring labor?

A. They are so shown in the estimate.

Q. You say that the material for the annunciator would cost $250?

A. That is the way it is estimated, yes.

Q. Do you think that is correct?

A. I do.

Q. Now, Mr. Smith, look under the head of material where it says "annunciators, $270."

A. Which plant have you, Chehalis or Dryad?

Q. $250 at one place and $270 at the other, is that correct?

A. Yes.

Q. That is for two annunciators?

A. Yes.

Q. So that it would be half of that for each one?

A. Yes, for material

Q. So that you didn't mean to say that each one of them would cost $250 or $270?

A. I am incorrect about that. It is half of it.
Q. So that Mr. Perkin's statement was about correct, wasn't —?
A. Yes, I will concede that point.

Witness excused.

Mr. Dudley: That's all.

78 L. M. PERKINS, being recalled by the respondent, testified as follows:

Direct examination.

By Mr. Reid:

Q. Mr. Perkins, if a train should approach an interlocking plant and find the *f*ignals set against it, set at a stop, and it should not stop, what would be the result?
A. They would be thrown off the de-rail.
Q. So that the interlocking plant acts as an absolute preventative from a train on one road running into a train on the other road?
A. Yes.
Q. And the train must stop if the signals are set against it or be de-railed?
A. Yes.
Q. Now, awhile ago you stated that the primary function of an interlocking plant was to allow trains to pass over the crossing without stopping. Is an interlocking plant considered of primary importance in preventing collisions between trains at crossings?
A. That would be the primary function *ot* it, to prevent collisions. That is the reason why it is installed in a good many cases, to prevent the necessity for stopping and avoiding it in the cost.
Q. In what way would an interlocking plant have any superiority over a flagman standing at the crossing to give signals to the approaching train?
A. If the engineer of the train disregarded the flagman there is nothing else to stop him. With an interlocking plant there is something else.
79 Q. So that it is a protection against human frailty?
A. Yes.

Cross-examination.

By Mr. Dudley:

Q. The interlocking plants are usually installed by railway companies where the train men see that *that* the cost of stopping and starting the trains again, when capitalized, exceeds the cost of the interlocking plant?
A. That is sometimes material; not always, by any means.
Q. In the practical operation of railroads a very large controlling factor in erecting interlocking plants, is to avoid the cost of stopping at the crossings and delays incident to stopping?

A. Not to the extent it, by any means, is the controlling factor always.

Q. But that is one of the factors?

A. That is one of the factors that is generally taken into consideration.

Q. Now if the train always stopped at the crossings it is as safe as an interlocking plant, isn't it?

A. If they always stop?

Q. Yes?

A. Yes, sir.

Witness excused.

Taking of testimony closed.

During argument the following cases were referred to:

State on relation North Coast Ry. v. N. P. Ry. Co., 49 Wash., page 78.

Morin v. Erie Ry., 149 N. Y. Supplement.

80 RESPONDENT'S EXHIBIT "ONE."

Before the Public Service Commission of Washington.

No-. 1737-1738.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

Stipulation.

It is hereby stipulated by and between the respective parties hereto as follows:

I.

That it has been the uniform custom and practice of the various railway companies in this state, both prior and subsequent to the passage of the Act of 1913, chapter 30, where one railway company crossed the tracks of another railway company at grade and an interlocking plant was necessary and installed, that the junior company desiring the crossing would pay all of the cost and expense of installing, maintaining and operating such interlocking plant, the senior company not being put to any expense whatever by reason of the installation, maintenance and operation of such interlocking plant.

II.

It is further stipulated that the petitioner offered in this instance to pay the cost of installation, operation and maintenance of the

interlocking plant at the crossing involved in this proceeding provided that the Northern Pacific Railway Company would consent to a grade crossing not interlocked, until such time as the petitioner should deem an interlocking plant desirable and necessary and install the same, at which time the said petitioner offered to pay all of the cost of installation, maintenance and operation thereof.

Docketed, 1737-1738.

81 III.

It is further stipulated that the petitioner reserves the right to object to the relevancy, materiality or competency of the facts hereinbefore stipulated.

Dated this 26 day of Mar. A. D. 1915.

F. M. DUDLEY,
Attorney for Petitioner.

GEO. T. REID,
Attorney for Respondent.

82 In the Superior Court of the State of Washington Holding Terms in and for the County of Lewis.

No. 6428.

THE STATE OF WASHINGTON on the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Defendants.

Certificate.

This is to certify that the attached and foregoing document consisting of twenty-two pages including the title page, is a full, true and correct transcript of the testimony and proceedings taken and had before the Public Service Commission of Washington at the hearing held before said commission on March 26th, 1915, in those certain causes lately pending before said commission entitled:

No. 1737.

No. 1738.

"In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the railway of the Northern Pacific Railway Company in the northeast quarter (N. E. ¼) of section one (1), township thirteen (13) north, range three (3) west, in Lewis County, Washington.

In the Matter of the Application of the Puget Sound & Willapa Harbor Railway Company for permission to cross at grade the following railway tracks:

A. An industry railway spur in section two (2), township thirteen (13) north, range five (5) west, W. M.

B. The railway track of the Northern Pacific Railway Company in section one (1), township thirteen (13) north, range five (5) west, W. M.

C. An industry spur in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M.

83 D. A logging railway in the town of Dryad in section one (1), township thirteen (13) north, range five (5) west, W. M."

Attached hereto and marked "Respondents' Exhibit 1," is the original stipulation offered in evidence by the respondent, Northern Pacific Railway Company, at said hearing before said commission as shown on page numbered two of the transcript of testimony hereinbefore referred to.

The stipulation offered in evidence at said hearing before said commission by the Puget Sound & Willapa Harbor Railway Company, petitioner, in said proceeding and marked "Petitioner's Exhibit A" as shown on page numbered one of said transcript of testimony, is the stipulation, copy of which is attached to relator's petition in the above entitled cause No. 6428, pending in the superior court of Washington in and for the County of Lewis and therein marked and referred to as "Exhibit X," for which reason said stipulation is not attached to the foregoing transcript of testimony.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Public Service Commission of Washington, this 7th day of February, 1916.

[Seal of Commission.] J. H. BROWN,
Secretary of the Public Service Commission of Washington.

Endorsed: "Recd. & Filed Feb. 10, 1916. B. S. Gage, Clerk."

84 In the Superior Court of Lewis County, State of Washington.

STATE OF WASHINGTON ex Rel. PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendant-.

Decision.

This cause comes before the court, on a writ of review from the action of the State Railway Commission adjusting the matter of

expense of installing crossing devices at two railroad crossings of the lines of plaintiff and defendant between Chehalis and Raymond.

The defendant's line of road between said points was constructed in the early '90's. The plaintiff's line has been built within the last three years. The record presented here by the petition the return and the evidence is quite voluminous and need not be gone into extensively for the purpose of arriving at the issue of law to be settled.

The altercations began when the plaintiff attempted to cross defendant's line at grade crossings. During the determination of these questions the parties entered into stipulations whereby each party was protected in its respective right to have the questions at issue here settled by the State Commission and the Courts. The plaintiff's line has been constructed crossing defendant's at grade crossing and the Commission has ordered interlocking devices to be provided including watch tower and the various pieces of mechanism as a precaution against collision and for avoiding delay in the operation of trains. This order left the question of expense open for adjudication in the future. Afterwards on petition of plaintiff a hearing was had on this question and the findings and order of the commission *was* as follows:

85 "1. That for some years prior to the construction of the Puget Sound & Willapa Harbor Company's line, the Northern Pacific Railway Company had been operating its railway line known as the 'South Bend-Chehalis Line,' in Lewis County, Washington.

2. That prior to the construction of the line of the Willapa Harbor Company, there was no necessity for interlocking devices at the points concerning which the dispute now before the Commission has arisen, as the crossings under consideration did not exist.

3. That the installation of interlocking plants is primarily to avoid the cost and delays involved in stopping trains at grade crossings where such plants are not installed, and to secure safety in operation.

4. That aside from the general benefits accruing to the public from the construction and maintenance of the Willapa Harbor Company's railway line, no benefit accrues to the Northern Pacific Railway Company by the maintenance of said crossings.

5. That the necessity for the maintenance of said crossings and interlocking devices arises by reason of the construction and operation of the line of the Willapa Harbor Company at those particular points, and that except for such construction and operation by the said Willapa Harbor Company there would be no occasion for the maintenance of said crossing and interlocking devices.

Wherefore, the Commission concludes that it would be unreasonable to require the Northern Pacific Railway Company to bear any portion of the cost of construction and installing and maintaining the interlocking devices at the crossings above referred to, and and order of the Commission will be entered in conformity with the findings and conclusions herein set forth."

The order entered (Exhibit "Z" attached to the Petition) is omitting immaterial matters, as follows:

"It is hereby ordered, that the Puget Sound & Willapa Harbor Railway Company shall maintain for the protection of the crossings hereinafter mentioned, adequate interlocking devices, and that such interlocking devices — by and at the expense of the said Puget Sound & Willapa Harbor Railway Company, it being understood that said interlocking devices have been heretofore installed.

The Public Service Commission of the State of Washington will not require the Northern Pacific Railway Company to pay any portion of the expense of installing or maintaining the said interlocking devices."

The petition for review is on the following grounds:

(*a*) That finding No. 2 of said findings is wholly irrelevant and immaterial.

(*b*) That finding No. 4 is contrary to the evidence and is inconsistent and in conflict with finding No. 3.

(*c*) That finding No. 5 is wholly irrelevant and immaterial.

(*d*) That the conclusion, that it would be unreasonable to require the Northern Pacific Railway Company to bear any portion of the cost of construction and installing and maintaining the interlocking devices at the said crossings, is not supported by the findings, but is inconsistent and in conflict with Finding No. 3 and is inconsistent and in conflict with the provisions of chapter 30 of the laws enacted at the Thirteenth Session of the Legislature of the State of Washington, being an act approved March 6, 1913, and with the provisions of Section 13, of article 12 of the constitution of the State of Washington, and with the provisions of section 8736 of Remington & Ballerger's Annotated Codes and Statutes of Washington.

(*e*) That the order Exhibit "Z" so made and entered by the said Commission, is unreasonable, unjust, inconsistent and in conflict with the provisions of the said chapter 30 of the laws enacted at the Thirteenth Session of the Legislature of the State of Washington, with said section 13, of article 12 of the constitution of the State of Washington, with said section 8736 of Remington & Ballinger's Annotated Codes and statutes of Washington and with said finding No. 3.

No attempt will be made here to discuss these findings or assignments of error ad seriatim. The evidence went largely to the question of ratio in apportioning of costs. Some evidence appears also in the nature of expert testimony on the question of who is benefited by these improvements. But I fail to see that this is a subject for expert testimony in the presence of so plain a situation.

It will be seen that the Commission placed the entire burden of these improvements on the plaintiff. Could they or should they have done so, is the substantial question presented by the record and the briefs.

These two roads are of the same character of transportation lines, built on the same plan, operated the same way, carry the same kind of traffic. It goes without saying that other things being equal when the state exercises its authority in ordering a certain character of crossing where they intersect, thereby requiring the expenditure of

money, it should in justice and reason divide the burden between them in such proportion as will not work an injustice to either. The statement of the proposition is its own argument, but it is upheld by overwhelming authority. Do they stand on an equal footing in the present cause as pertains to this question? The brief of plaintiff is so long and exhaustive. It cites numerous decisions from the strongest and wisest judicial tribunals of the land to the effect, that no discrimination should be made between an old and long established road and one recently constructed or in the process of construction. The dictum of these Courts is strong authority within its self, but their reasoning is to me quite irresistable. I am unable to agree with the doctrine that a railroad serving the public as a public carrier for a long time acquires any rights in this respect that a latter road should not enjoy. It is true that it is operated all of these years without this burden on it, and could do so in the future but
88 for the fact that some other company conceived the notion of crossing its track. But this past freedom from annoyance is incidental, a matter of good fortune, and not one of perpetual right like ownership of the road bed. It was always subject to the right of the other road to cross it and the new road may be as much or more a necessity than the old. Its burden by reason of the crossing should be no greater. To say if the junior company had not conceived the idea of building its road, the senior company would not be burdened, is no more logical than to say that if the senior road had not been there the junior company would not be burdened. The case of a railroad casting burdens on privately owned and operated property has no analogy here. This is a case where the sovereign state undertakes to control the situation and no discrimination should be indulged in between the Junior and the Senior road.

These conclusions are not decisive of this case which in a final analysis involves a consideration of the legislation in this state and such constitutional guaranties as are enlisted in its settlement. Section 8736 Remington & Ballinger's Codes secure- to a railroad company the right to construct its line across the line of another company and requires the existing road to cooperate with the road under construction in facilitating the crossing. The right of such crossing is guaranteed by the State constitution which was adopted since the enactment of section 8736 of the Code. The constitution Art. 12 Sec. 13 further provides that where roads intersect or the terminus of one is adjacent to the line of termination of another, the two roads shall provide convenient means for the transfer of cars so that they may be conveniently changed from one to the other.

In 1913 the legislature passed an act relating to rail road crossings. Chap. 30. Sesh. Laws 1913. P. 74, Section 3 and sub-division C. of Section 6. of that act came up for construction in this case. Prior to that this state was unequivocally committed to the
89 doctrine that the junior road must at its own expense install the interlocking devices, State ex rel. North Coast Railway, vs. N. P. Ry. Co., 49 W. 78. The two sections of the laws of 1913 are open to construction. Both might have been couched in terms making their meaning plainer than it is. It is the contention of re-

pondent that subdivision C Sec. 6 warrants the finding and order nade here which casts the entire burden on one road. It probably ould where such an order was consistent with the reason ans spirit f *of* the section and the facts of the case. Suppose in this case ney had placed the entire burden on the Senior road, ought not the ourt to enquire whether it was a mere arbitrary act or whether they sed some method of ascertainment with a view to apportioning" the ost. We may admit that apportioning might mean in particular ase the placing of the entire burden on one. But certainly there nust be something in the nature of the situation that would warrant uch action. And where it appears from the record that such an rder was made on the theory that the commission considered it had o authority to make any other, whereas it appears that it did have uch authority in the premises, then it seems the matter ought to be e-submitted to them.

The Court is of the opinion however that Section 3. and sub-division '. Sec. 6 refer to different situations. Sub-division C applies to ases generally. Section 3 applies to cases where application for rossings are made to the Commission by the Junior or proposed oad. And where the Commission have jurisdiction to settle the uestion of grade crossing by a road not yet constructed, they have nd retain the power to require such road to "install and maintain roper signals, warnings, flagman, interlocking devices or other evices or means to secure the safety of the public and its employees." think the words "The Railroad Company" in that part of the sec- on means the company in whose favor the Commission decides the uestion of permitting the grade crossing. Which is the Junior Company. I will admit that other contingencies might arise under the broad provision of this action that would be difficult to decide consistently with the meaning I ascribe to it here. The statute as thus construde does not seem to invade any of the uaranties of the constitution and this construction appears to the ourt to be the only one that will give effect to the two provisions ound in the act of 1913. With this view of the intention of the egislature the action of the Commission is affirmed.

Dated March 31st, 1916. RICE. *J.*

In the Superior Court of the State of Washington in and for Lewis County.

No. —.

TATE OF WASHINGTON ex Rel. PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Judgment.

This case having come on to be heard at a former day of this rm of court on the petition for writ of review of the relator, Puget

Sound & Willapa Harbor Railway Company, and return of the Public Service Commission thereto, and the court having heard the arguments of counsel and being fully advised in the premises is of the opinion that the order of the Commission, providing that the relator should pay the entire cost and expense of installation, maintenance and operation of the interlocking device in question, is just and reasonable and should be sustained.

It is therefore ordered, adjudged and decreed that the said order of the Pubic Service Commission be, and the same is hereby, approved and affirmed in all particulars, and that the respondents shall recover their costs to be taxed in the sum of $—.

To the foregoing judgment the relator excepts and its exception is allowed.

Dated this 17 day of April, 1916.

A. E. RICE, *Judge.*

Endorsed: "Recd. & Filed Apr. 17, 1916. B. S. Gage, Clerk, A. Tripp, Deputy."

92 In the Superior Court of the State of Washington in and for Lewis County.

No. 6428.

STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Notice of Appeal.

To the above named defendant, Northern Pacific Railway Company and to Messrs. George T. Reid and L. B. da Ponte, your Attorneys, and to the above named defendant, Public Service Commission of the State of Washington, and to Messrs. W. V. Tanner and Scott Z. Henderson, your attorney-:

You and each of you will please take notice that the above named plaintiff hereby appeals to the Supreme Court of the State of Washington from that certain judgment made and entered in the above entitled Court, in said cause on to wit: the 17th day of April, A. D. 1916, wherein and whereby the above entitled court approved and affirmed in all particulars the order of the Public Service Commission for the review of which said proceeding was brought, and from each and every part of said judgment.

F. M. DUDLEY,
Attorney for Plaintiff and Appellant.

93 STATE OF WASHINGTON,
County of King, ss:

L. E. Neuman, being first duly sworn on oath deposes and says: that he is a clerk in the legal department of the Chicago, Milwaukee & St. Paul Railway Company; that he, to wit: on the 19th day of April, A. D. 1916, served the foregoing Notice of Appeal upon the defendant, Public Service Commission of Washington, by depositing in the United States Post Office, at Seattle, Washington, a true and correct copy of said Notice of Appeal, sealed in an envelope, with the postage thereon duly prepaid, addressed to Mr. Scott Z. Henderson, Olympia, Washington; that the said Scott Z. Henderson is the attorney of record for the said defendant, Public Service Commission of the State of Washington, and that Olympia, Washington is his residence and post office address.

L. E. NEUMAN.

Subscribed and sworn to before me this 19th day of April, 1916.
[NOT. SEAL.] FLOYD H. WILLIAMS,
Notary Public in and for said County and State Residing at Seattle Therein.

A true copy of the within Notice of Appeal received and due service of same acknowledged this 19th day of April, A. D. 1916.
L. B. DA PONTE,
For N. P. Ry. Co.

Endorsed: "Recd. & Filed Apr. 20, 1916. B. S. Gage, Clerk. A. Tripp, Deputy."

94 In the Superior Court of the State of Washington in and for Lewis County.

No. 6428.

STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Appeal Bond.

Know all men by these presents: That we, the Puget Sound & Willapa Harbor Railway Company, a Washington corporation, as Principal, and the National Surety Company, of New York, as Surety, are held and firmly bound unto the above named defendants, Northern Pacific Railway Company, a corporation, and the Public

Service Commission of the State of Washington, in the sum of Two Hundred Dollars ($200.00) lawful money of the United States of America, for the payment of which sum unto the said defendants well and truly to be made, we bind ourselves, our and each of our successors.

Sealed with our seals and dated this 19th day of April, A. D. 1916.

Whereas, thw above named plaintiff and Principal has appealed to the Supreme Court of the State of Washington from that certain judgment made and entered in the above entitled cause and court on to wit: the 17th day of April, A. D. 1916, wherein and whereby the said court ordered, adjudged and decreed that a certain order of the Public Service Commission be approved and affirmed in all particulars, and that the respondents should recover their costs, and from each and every part of said judgment:

Now therefore, the condition of the foregoing obligation is as follows, to wit: That if the said appellant, Puget Sound & Wil-
95 lapa Harbor Railway Company will pay all costs and damages that may be awarded against it, or the State of Washington upon its relation on said appeal, or on the dismissal thereof, then this obligation shall be null and void, otherwise to remain in full force and effect.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY,
By H. B. EARLING, *Vice-President.*
NATIONAL SURETY COMPANY,
By ——— ———,
(Could not read signature of Resident Vice-President.)
Resident Vice-President.
[CORP. SEAL.] E. M. KELLY,
Resident Assistant Secretary.

Endorsed: "Recd. & Filed Apr. 20, 1915. B. S. Gage, Clerk. A. Tripp, Deputy."

96 STATE OF WASHINGTON,
County of Lewis, ss:

I, B. S. Gage, Clerk of the Superior Court, of Lewis County, Washington, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court this 20 day of April, 1916.

[SEAL.] B. S. GAGE, *Clerk,*
By A. TRIPP, *Deputy.*

Documentary Stamp. Ten cents. 4/20/16. A. T.

(Here follow blue-prints marked pp. 97*a* to 97*d*.)

MAP

TOO

LARGE

FOR

FILMING

97½ Filed in Supreme Court of Washington Apr. 21, 1916. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

13464.

STATE OF WASHINGTON upon the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Respondent.

Stipulation.

It is hereby Stipulated by and between the parties hereto by their respective attorneys that the above entitled cause may be placed upon the calendar for hearing during the May term of said Court, and the said parties hereto further request that the said Court may hear said cause before the Court sitting en banc.

F. M. DUDLEY,
Attorney for Appellant.
L. B. DE PONTE,
For N. P. R.,
SCOTT Z. HENDERSON,
Attorneys for Respondents.

98 [Filed December 26, 1916.]

En Banc.

No. 13464.

THE STATE OF WASHINGTON on the Relation of THE PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Respondents.

The appellant, Puget Sound & Willapa Harbor Railway Company, in the construction of a line of railway through Lewis county, found it necessary to cross in two places the existing railway of the respondent Northern Pacific Railway Company. It desired to make the crossings at grade, and to that end petitioned the public service commission for leave so to do. A hearing was had on the petition, at which leave was granted to make the crossings as peti-

tioned for, on condition that suitable interlocking devices be installed and maintained at the crossings. After the entry of the order granting the leave by the commission, the railway companies agreed upon the character of the device to be installed, but failed to agree on an apportionment of the expense for installing the same, the respondent refusing to bear any portion of the expense whatsoever. The appellant thereupon petitioned the public service commission to apportion such expense, and a hearing was had before that body upon this petition. At the conclusion of the hearing, the commission decided that the expense of installing the devices as well as their subsequent maintenance should be borne by the appellant company, and entered its order to that effect. The appellant caused the order to be reviewed in the superior court of Lewis county, where it was affirmed. This appeal is from the judgment of affirmance.

The provisions of the statute material to a consideration of the questions involved are found at §§ 8733-2, 8733-3, and
98a subdivision c. of § 8733-6 of Rem. Code, and are quoted in full:

"All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so. All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so: Provided, that this section shall not be construed to prohibit a railroad company from constructing tracks at grade across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades: the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry." Id., § 8733-2.

"Whenever any railroad company desires to cross any highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade, and whenever the county commissioners of any county, or the municipal authorities of any city or town, or the state officers authorized to lay out and construct state roads, desire to lay out or extend any highway across any railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving such petition the commission shall immediately investigate the same, giving at least ten days' notice to the railroad company or companies and the county or municipality affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard. If

the highway involved is a state road, the state highway commissioner shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing. The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the rail-
98*b* road company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees. If upon investigation the commission shall find that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided, it shall continue the hearing on the petition and hold a supplemental hearing thereon. At least ten days' notice of the time and place of such supplemental hearing shall be given to all land owners that may be affected by the proposed change in location of the highway. At such supplemental hearing the commission shall inquire into the propriety, advisability and necessity of changing and deflecting the highway as proposed for the purpose of securing an over-crossing under-crossing, or safer grade crossing. If the proposed change in route of the highway involves the abandonment and vacation of a portion of an established highway, the owners of land contiguous to the portion of the highway to be vacated and abandoned shall, in like manner, be notified of the time and place of the supplemental hearing. At the conclusion of the hearing on the petition, the commission shall make and file its findings of fact in writing concerning the matters inquired into, and shall determine the location of the crossing which may be constructed, and whether the same shall be an under-crossing, over-crossing, or grade crossing, and shall determine whether or not any proposed change in the route of an existing highway, or the abandonment of a portion thereof is advisable or necessary to secure an over-crossing, under-crossing, or safer grade crossing. If the commission shall find and determine that a change in route of an existing highway, or abandonment and vacation of a portion thereof is necessary or advisable, it shall further find and determine what private lands, property, or property rights, if any, it is necessary to take, damage, or injuriously affect, for the purpose of laying out and constructing the highway along a new route, and what private lands, property or property rights, if any, will be affected by the proposed abandonment and vacation of a portion of an existing highway. The lands, property and property rights found necessary to be taken, damaged, or affected shall be described in said findings with reasonable accuracy, and the right to take, damage or injuriously affect the same shall be acquired as hereinafter provided. In any action brought to acquire the right to take, damage, or injuriously affect

any such lands, property, or property rights, the finding
98c of the commission shall be conclusive as to the necessity fo
taking, damaging, or injuriously affecting the same. A
copy of said findings shall be served upon all parties to the cause.
§8733-3.

"Whenever two or more lines of railroad owned or operated b
different companies cross a highway, or each other, by an over
crossing, under-crossing or grade crossing required or permitte
by this act or by an order of the commission, the portion of the ex
pense of making such crossing not chargeable to any municipality
county, or to the state, shall be apportioned between said railroa
companies by the commission unless said companies shall mutuall
agree upon an apportionment. If it becomes necessary for the com
mission to make an apportionment between the railroad companies
a hearing for that purpose shall be held, at least ten days' notic
of which shall be given." §8733-6 c.

It is the contention of the appellant that these statutes requir
an apportionment of the expense of installing and maintaining such
crossing devices as the commission may require to be installed fo
the protection of the public, and hence that the order of the com
mission in this instance, since it required the appellant to bear th
whole expense of installing and maintaining the interlocking devic
required by its order, is in violation of the statute, and is other
wise unjust and inequitable. On the other hand, it is contended
by respondent that the statute, properly construed, relates only t
the expense of the actual crossing, of which an interlocking devic
is not a necessary part; and further, that to construe the statute i
such a way as to compel the senior road to pay any part of the ex
pense of constructing a crossing, or the devices required to be in
stalled in connection therewith, is to render the statute unconstitu
tional, since it is to permit a taking of the property of the senio
road for the benefit of the junior without any corresponding benefi
and hence a taking without compensation.

Noticing first the question of construction, it must be confesse
that the statute is not entirely clear as to its meaning. The languag
used, giving it a literal construction, seems to support the respond
ent's contention. It will be noticed that § 8733-3 appears to refe
to the interlocking and other devices which the public service com
mission may in its discretion require to be installed by "the rail
road company" for the protection of the public, as something in
addition to the actual construction of the crossing, while subdivisio
c. of § 8733-6 makes no reference to these devices, but refers to th
"expense of making such crossing" only. The railroad compan
named in the first section must, from the context, refer t
98d the railroad company desiring to make the crossing, not t
the railroad company whose tracks are crossed; and the re
quirement that it shall install and maintain the protective device
means, in the absence of explanatory words, that it shall instal
and maintain them at its own expense. But to construe the lan
guage thus literally seems to conflict with the spirit and intent o
the act, and we think that the later section, in its reference to th

expense of the crossing, means not only the expense of constructing the actual crossings, but the expense of constructing and maintaining such protective devices as the commission may require to be constructed and maintained therewith. The expense of constructing and maintaining the actual crossing is, the record shows, but nominal when compared with the cost of installing and maintaining the protective devices. It is, moreover, wholly for the benefit of the crossing road, while the protective devices can be said to be for the benefit of both roads, since they lessen the danger of accidents and permit a more economical operation of both. It is not, therefore, to be supposed that the legislature, in providing for an apportionment of the expense, referred to this lesser consideration to the exclusion of the one of so much greater importance, and we cannot so hold. "The real meaning of a statute is to be ascertained and declared, even though it seems to conflict with the words of the statute." Landers v. Smith, 78 Me. 212; Orono v. Bangor R. & Elec. Co., 105 Me. 428; Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co., 123 Iowa, 543.

Passing to the constitutional question, it must be remembered when considering it that the appellant does not seek to have the expense of constructing the crossing proper apportioned between itself and respondent, but seeks only to have so apportioned the expense of installing and maintaining the interlocking device required by the public service commission. It must be remembered, also, that an interlocking device is no part of the crossing proper. Crossings at grade existed long prior to the invention of such devices, and many grade crossings now exist and are in use in this state where no such device is installed. The device is a safety device, having for its primary purpose the protection of the public from accident, and a secondary purpose of enabling the crossing roads to operate their trains more economically, in that it does away with the necessity of stopping before crossing the opposing track other than when signaled so to do. Rem. Code, §8626-69.

The right of one railroad company to construct its tracks across the tracks of another company, while guaranteed by the con-
98e stitution and statutes of this state, exist without such guaranty.

The right to cross could be condemned in the same manner the right to cross other property was condemned. The great weight of authority is, however, in the absence of a statute to the conrary, to the effect that the crossing company must bear the expense of the crossing. This includes not only the cost of constructing the grades and laying the tracks, but the cost of installing and maintaining such safety devices as the necessities of the particular case might require. Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co., 98 Minn. 330; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418; State ex rel. Northern Pac. R. Co. v. Railroad Commission of Wisconsin, 140 Wis. 145; Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350; Butte, A. & P. R. Co. v. Montana U. R. Co., 16 Mont. 504; West Jersey & C. R. Co. v. Atlantic City & S. Traction Co., 65 N. J. Eq. 613; Winona & S. W. R. Co. v. Chicago, Milwaukee

& St. Paul R. Co., 50 Minn. 300; Elkins Elec. R. Co. v. Western Maryland R. Co., 163 Fed. 724; Chicago & W. I. R. R. Co. v. Englewood Conn. R. Co., 115 Ill. 375.

In our own case of State ex rel. North Coast R. v. Northern Pac. R. Co., 49 Wash. 78, a proceeding brought by the relator to cross the track of the defendant at grade, we held it to be the duty of the relator to bear the expense of making and maintaining the crossing as well as an interlocking device found necessary to be installed for protective purposes. Announcing the same principle, although presenting different states of facts, are the cases: State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540; Northern Pac. R. Co. v. Union Lumber Co., 76 Wash. 563; Spokane v. Spokane & Inland Empire R. Co., 75 Wash., 651. The grounds upon which the principle was rested in some of these cases lend strong color to the contention of the respondent, but it must be remembered that the cases were determined in the absence of statutes requiring an apportionment of costs and without that thought being in the mind of the court when the opinions were framed. The language of the court must be construed with reference to the question actually before it and since the question now before us was not presented in any of them, they cannot be said to be conclusive of it.

98*f* A railroad company which has procured a right of way for its line and laid tracks thereover clearly has a vested property right therein, and any other company crossing such right of way is bound to make compensation for the property actually taken and damaged, regardless of any statutory provision to the contrary. But a railway company first in time acquires no exclusive right to the territory through which it passes or exclusive right to operate its road in any particular manner. Both under the principles of the common law and by the express provisions of the constitution and statutes of this state, its line was subject to being crossed by the line of another railroad company. The language of the Supreme Court of the United States, in Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, is applicable. It is there said:

"The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of

the people. In the recent case of N. Y. & N. E. Railroad v. Bristol, 151 U. S. 556, 567, this court declared it to be thoroughly established that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. 'The governmental power of self-protection,' the court said, 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental
98*g* regulation in particulars essential to the preservation of the community from injury.' See New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 671."

It is, therefore, within the power of the state, whenever it deems the public safety may so require, to impose upon railway companies whose tracks cross each other at grade the duty of installing and maintaining at such crossing such safety devices as the conditions may require. And since such devices are not necessary to the successful operation of the road but are required for the safety of the public, it would seem to follow that the state might provide, without violating the constitutional inhibition against the taking of private property for a public use, that the expense of installing and maintaining such devices could be apportioned between two railway companies, even though the installation is required to be made at the time when the one is constructing a new track across the existing track of another. We so hold, and while we think the rule applicable to any form of safety device, we think it particularly applicable to the one in question, since it has, as we say, the double purpose of protecting the public and enabling each of the roads to more economically operate its trains.

If follows from this that the public service commission and the trial court were in error in imposing the entire obligation of installing and maintaining the required interlocking device upon the appellant, unless it can be said that the power to apportion the expense between the companies includes the power to impose it all upon one of the companies. In Toledo R. & Terminal Co. v. Lima & Toledo Traction Co., 79 Ohio St. 136, the court held that an apportionment of the costs did not necessarily mean an equal apportionment and, in a subsequent appeal of the same case, said that to require one company to bear all of the expense was not an apportionment, the true rule appearing to be that a substantial apportionment is required.

So interpreting the statute, we cannot conclude in this instance that the order of the commission can stand. The record shows no equity in favor of the one road over the other. The order was based entirely on the fact that one was first in time, and since we conclude that this is not sufficient under the statute to relieve it from a share of the expense, it follows that the burden of installing and maintaining the interlocking device should be divided equally between the companies.

The judgment appealed from is reversed, and the cause remanded

with instructions to direct the public service commission to appo
tion the expense of installing and maintaining the interloc
98*h* ing device mentioned equally between the railroad compani
interested. FULLERTON, *J.*

Mount, Main, Ellis, Parker, and Chadwick, JJ., concur.

HOLCOMB, *J.* (concurring):

I concur in the result, assuming that the public service comm
sion will apportion the cost as suggested in Toledo R. & Terminal C
v. Lima & Toledo Traction Co., 79 Ohio St. 136. I do not agree th
the railroad first occupying a right of way has no superior right
equity as against a subsequent occupier of the right of way for t
purpose of crossing. As against it, I think the first occupier has
very superior position and right. As against the sovereign, of cour
it has not, but in apportioning the costs involved here, the superi
and prior position of the first occupier should be given very gre
advantage.

99 No. 13464.

En Banc.

Filed August 8, 1917.

THE STATE OF WASHINGTON on the Relation of PUGET SOUND
WILLAPA HARBOR RAILWAY COMPANY, Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY et al., Respondents.

On Rehearing.

Per Curiam:

Upon a rehearing En Banc, a majority of the court still adhere
the opinion heretofore filed herein as reported in 52 Wash. Doc.
94 Wash. 10, and for the reasons there stated, the judgment is
versed, and the cause remanded with instructions to follow the ord
of the departmental opinion.

100 In the Supreme Court of the State of Washington, Thursda
August 9, 1917.

No. 13464.

STATE ex Rel. PUGET SOUND & WILLAPA HARBOR RAILWAY CO
PANY, Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY et al., Respondents.

Judgment.

This cause having been heretofore submitted to the court upon t
transcript of the record of the superior court of Lewis county a

upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 9th day of August, A. D. 1917, on motion of F. M. Dudley, Esquire, of counsel for appellant, considered, adjudged, and decreed that the judgment of said superior court be and the same is hereby reversed with costs; and that the said Puget Sound & Willapa Harbor Railway Company have and recover of and from the said Northern Pacific Railway Company and Public Service Commission of the state of Washington the costs of this action taxed and allowed at One Hundred & 75/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

101 Filed in Supreme Court of Washington Oct. 15, 1917. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

13464.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Error.

Come now the Northern Pacific Railway Company and Public Service Commission of the State of Washington, plaintiffs in error, and show to this court that in this cause, styled on the docket of the Supreme Court of the State of Washington "State of Washington ex rel. Puget Sound & Willapa Harbor Railway Company vs. Northern Pacific Railway Company and Public Service Commission of the State of Washington," on the 26th day of December, 1916, this court rendered an opinion and judgment reversing the judgment of the Superior Court of the State of Washington and remanding this cause to the Public Service Commission with specific directions to award against plaintiff in error, Northern Pacific Railway Company, one-half of the cost of constructing certain grade crossings and interlocking devices thereat between the railways of the plaintiff in error, Northern Pacific Railway Company, and defendant in error, Puget Sound & Willapa Harbor Railway Company, in Lewis County, Washington, which judgment was and is a final judgment herein. Subsequently and in due time plaintiffs in error petitioned for a rehearing, which was granted, and this cause set for reargument en banc, and on the 8th day of August, 1917, this court ren-

102 dered a further opinion and judgment, and the majority of the court adhered to their original opinion and judgment filed herein, as aforesaid.

Plaintiffs in error were and are aggrieved by the said judgment and the proceedings had in this cause in that certain errors were committed to its prejudice specially pointed out in the assignment of errors herewith presented.

In this action defendant in error petitioned the Public Service Commission of this State for an order permitting a crossing at grade between the railroads of plaintiff in error, Northern Pacific Railway Company, and defendant in error, and asked that a part of the costs of such crossing and of certain safety devices known as interlockers be apportioned by the Public Service Commission to plaintiff in error, Northern Pacific Railway Company, claiming such order to be required by Chapter 30, page 74, Laws of 1913 of the State of Washington. But plaintiff in error, Northern Pacific Railway Company, contended that said statute did not authorize or permit the apportionment of any part of the cost of said crossings or safety devices thereat and if construed in accordance with the contention of defendant in error, same was and is contrary to the constitution of the United States particularly the Fourteenth Amendment, prohibiting the taking of property without due process of law. Such proceedings were had before the Public Service Commission that a grade crossing was allowed, but it was ordered that the defendant in error should pay the entire cost of constructing such crossings and of installing and maintaining safety devices known as interlockers which the Public Service Commission annexed as a

103 condition of its consent to such grade crossing. Upon review proceedings to the Superior Court of Lewis County, Washington, the order of the Public Service Commission was affirmed, but on appeal by defendant in error to the Supreme Court of the State of Washington, the judgment of the Superior Court was reversed and this sause was remanded with directions to the Public Service Commission to apportion one-half of the cost of constructing such crossings and erecting, maintaining and operating said safety devices to plaintiff in error, Northern Pacific Railway Company.

The railroad of plaintiff in error, Northern Pacific Railway Company, had been constructed at the point of crossing many years prior to the construction of the railroad of defendant in error and when said railroad of plaintiff in error, Northern Pacific Railway Company, was constructed, the laws and statutes of the State of Washington expressly provided that any railroad thereafter desiring to cross the same should pay the entire cost of such crossing and construction of safety devices and plaintiff in error, Northern Pacific Railway Company, duly claimed and set up a right under the constitution of the United States, particularly the Fourteenth Article of Amendment, and alleged that to require plainiff in error, Northern Pacific Railway Company, to pay any part of the cost of constructing such crossings and erecting, maintaining and operating safety devices thereat, would amount to the taking of its property without due process of law, and that Chapter 30, page 74, Laws of

1913, of the state of Washington, if construed so as to per-
104 mit the imposition upon plaintiff in error, Northern Pacific Railway Company, of any part of the cost of constructing said crossings and erecting, maintaining and operating safety devices thereat and necessitated thereby, would be unconstitutional and in derogation of said Fourteenth Article of Amendment, prohibiting the taking of property without due process of law, all of which may be seen by reference to pages 6 et seq. of its brief filed herein, and pages 20 et seq. of its supplemental petition for rehearing.

Plaintiffs in error state that the judgment and opinion of the Supreme Court of the State of Washington deny said claim of right under the constitution of the United States, duly set up and claimed, and the same is believed to be erroneous. The decision so rendered by the *the* Supreme Court of the State of Washington is by the highest court in said State and is final and conclusive so far as the courts of said state are concerned, and will so remain, and plaintiff in error, Northern Pacific Railway Company, will be deprived of its constitutional rights unless said judgment is reviewed and corrected by the Supreme Court of the United States in virtue of the writ now prayed for.

Plaintiff in error, Northern Pacific Railway Company, further states that the amount apportioned and required by it to be paid to defendant in error as its one-half of the cost of constructing, maintaining and operating said crossings and interlocking devices, amounts to a sum in excess of $5,000.00.

Wherefore plaintiffs in error pray that a writ of error may issue to the Supreme Court of the State of Washington for the correcting
of the errors complained of, and that a duly authenticated
105 transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

L. B. DA PONTE,
Attorneys for Northern Pacific Railway Company.
W. V. TANNER,
HANCE H. CLELAND,
Attorneys for Public Service Commission of the State of Washington.

106 Filed in Supreme Court of Washington Oct. 15, 1917. C. Reinhart, Clerk. F. S. G.

In the Supreme Court of the United States.

13464.

No. —.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and T PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTO Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corpo tion, Defendant in Error.

Assignment of Errors.

Come now the plaintiffs in error, Northern Pacific Railway Co pany and The Public Service Commission of the State of Washi ton and show that in the record and proceedings in this cause, Supreme Court of the State of Washington erred to the injury the plaintiffs in error in the following particulars, to-wit:

I.

The Supreme Court erred in holding and deciding that Chap 30, Laws of 1913, page 74, insofar as the same authorizes imposition upon plaintiff in error, Northern Pacific Railway Co pany, of one-half of the cost of construction, installation a maintenance of safety devices known as interlockers at the crossi between the railroads of plaintiff in error, Northern Pacific Railw Company, and defendant in error, is constitutional and consist with the Fourteenth Amendment to the Constitution of the Uni States prohibiting the taking of property without due process law.

II.

The Supreme Court erred in its judgment and decision revers the order of the Public Service Commission of the State of Wa ington, directing and commanding that body to apportion to pl tiff in error, Northern Pacific Railway Company, one-half of cost of constructing the crossings and safety devices between railroads of plaintiff in error, Northern Pacific Railway C

107 pany, and defendant in error, and in so doing violated constitutional rights of plaintiff in error, Northern Pac

Railway Company, under the Fourteenth Amendment prohibiting the taking of property without due process of law.

L. B. DE PONTE,
Attorney for Plaintiff in Error Northern Pacific Railway Company.
W. V. TANNER,
HANCE H. CLELAND,
Attorney- for Plaintiff in Error The Public Service Commission of the State of Washington.

108 Filed in Supreme Court of Washington Oct. 15, 1917. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

13464.

No. —.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Defendant in Error.

Allowance of Writ of Error.

Come now the Northern Pacific Railway Company and The Public Service Commission of the State of Washington on this 15th day of October, 1917, and file and present to this court their petition praying for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and praying that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

Upon consideration of said petition, this court, through its Chief Justice, the Honorable Overton G. Ellis, desiring to give plaintiffs in error an opportunity to test in the Supreme Court of the United States the questions therein presented, it is ordered by the court that a writ of error be allowed as prayed for, provided, however, that plaintiffs in error shall give bond according to law in the sum of Five Thousand Dollars ($5,000.00), which bond shall operate as a supersedeas bond herein.

109 In testimony whereof, witness my hand this 15th day of October, 1917.

OVERTON G. ELLIS,
Chief Justice of the Supreme Court of the State of Washington.

110 Filed in Supreme Court of Washington Oct. 18, 1917. C. S. Reinhart, Clerk.

In the Supreme Court of the State of Washington.

No. 13464.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Defendant in Error.

Bond.

Know all men by these presents:

That we, Northern Pacific Railway Company, a corporation, and Public Service Commission of the State of Washington, as principals, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the above named defendant in error, the Puget Sound & Willapa Harbor Railway Company, in the sum of Five Thousand Dollars ($5,000.00), to be paid to it, and for the payment of which we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seals and dated the 16th day of October, 1917.

The condition of this obligation is such that, whereas, the Northern Pacific Railway Company and Public Service Commission of the State of Washington, plaintiffs in error, seek to prosecute its writ of error in the Supreme Court of the United States and to reverse the judgment rendered in this cause by the Supreme Court of the State of Washington.

Wherefore, if the above named plaintiffs in error shall prosecute its writ of error to effect and answer all costs and damages and pay and satisfy the judgment which may be rendered herein, if it fail
111 to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,
By L. B. DE PONTE, Its Attorney.
PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON,
By W. V. TANNER, *Its Attorneys.*
NATIONAL SURETY COMPANY,
By F. W. SWETTLAND, [SEAL.]
Its Attorney in Fact.

112 In the Supreme Court of the State of Washington.

No. 13464.

STATE OF WASHINGTON ex Rel. PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY

vs.

NORTHERN PACIFIC RAILWAY COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON.

Præcipe for Transcript on Writ of Error.

Honorable C. S. Reinhart, Clerk of the Supreme Court:

Please prepare the record on writ of error and include therein the following papers:

1. Transcript on appeal including the transcript of the testimony.
2. Judgment and opinion of Supreme Court.
3. Petition for writ of error.
4. Allowance of writ of error.
5. Assignment of errors.
6. Error bond.

I believe you also send up the original writ and original citation with acceptance of service thereon, also an acceptance of service of the other papers on the writ of error.

I will arrange to supply blue prints which are attached to the petition for writ of review included in the transcript on appeal.

L. B. DA PONTE,
Attorney for Defendants.

Filed in Supreme Court of Washington Oct. 29, 1917. C. S. Reinhart, Clerk.

113 Filed in Supreme Court of Washington Oct. 18, 1917. C. S. Reinhart, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the judgment in a cause in said Supreme Court, before you, or some of you, being the highest court of law or equity of said State in which a decision could be had, in a suit between the Puget Sound & Willapa Harbor Railway Company, as appellant, and the Northern Pacific Railway Company and Public Service Commission of the State of Washington, as respondents, wherein plaintiff in error, Northern Pacific Railway Company, claimed a right under the Constitution of the United States, namely, under the Fourteenth Article of Amendment to said Constitution

prohibiting the taking of property without due process of law, and in which the judgment of the said Supreme Court of the State of Washington denied the said claim of right under the said constitutional provision, manifest errors have happened to the great damage of the Northern Pacific Railway Company, as by its petition for writ of error and assignment of errors appears.

We being willing that error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from the date hereof, in the said
114 Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct those errors, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 15th day of October, 1917.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington,
By F. M. HARSHBERGER, *Deputy.*

Allowed by
PRESTON G. ELLIS,
Chief Justice of the Supreme Court of Washington.

115 Filed in Supreme Court of Washington Oct. 23, 1917. C. S. Reinhart, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Puget Sound & Willapa Harbor Railway Company, defendant in error, and F. M. Dudley, its attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within sixty (60) days of the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Washington, wherein the Northern Pacific Railway Company, a corporation, and the Public Service Commission of the State of Washington, are plaintiffs in error, and the Puget Sound & Willapa Harbor Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Overton G. Ellis, Chief Justice of the Supreme Court of the State of Washington, this 15th day of October, A. D. 1917.

OVERTON G. ELLIS,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Service of the foregoing citation is hereby accepted this 18th day of October, 1917.

F. M. DUDLEY,
Attorney for Defendant in Error.

116 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON on the Relation of PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Plaintiff & Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Defendants & Respondents.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of so much of the above entitled cause as I am required by the plaintiff in error to prepare and transmit to the Supreme Court of the United States.

And, in accordance with the Writ of Error filed in said cause, I now transmit said transcript, together with the original Writ of Error and the original Citation, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at Olympia, this 10th day of December, 1917.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: File No. 26276. Washington Supreme Court. Term No. 809. Northern Pacific Railway Company and Public Service Commission of the State of Washington, plaintiffs in error, vs. Puget Sound & Willapa Harbor Railway Company. Filed January 4th, 1918. File No. 26276.

In the Supreme Court of the State of Washington.

No. 13464.

STATE OF WASHINGTON EX REL. PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and PUBLIC Service Commission of the State of Washington, Respondents.

Judgment Nunc Pro Tunc.

The court having considered the motion of the Northern Pacific Railway Company and Public Service Commission for judgment nunc pro tunc to conform to the judgment actually rendered by this court on October 15, 1917, it is hereby ordered that said motion be and the same is hereby granted, and the Clerk will now enter nunc pro tunc as of October 15, 1917, the judgment of this court to read as follows:

"This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Lewis county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 9th day of August, A. D. 1917, on motion of F. M. Dudley, Esquire, of counsel for appellant, considered, adjudged, and decreed that the judgment of said superior court be and the same is hereby reversed with costs; and that the said Puget Sound & Willapa Harbor Railway Company have and recover of and from the said Northern Pacific Railway Company and Public Service Commission of the state of Washington the costs of this action taxed and allowed at One Hundred & 75/100 dollars, and that execution issue therefor.

And it is further ordered that this cause be remitted to the said superior court with instructions to enter judgment directing the Public Service Commission to apportion equally between the railroad companies interested the expense of installing and maintaining and operating the interlocking devices mentioned."

And it is further ordered that a copy of this judgment be transmitted to the Clerk of the Supreme Court of the United States to be made a part of the record in this cause.

Dated the 29th day of July, 1918.

JOHN F. MAIN,
Chief Justice.

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full,

true and correct copy of the Judgment Nunc pro tunc as the same was filed & entered on the 29th day of July, 1918 and now remains of record in my office.

[Seal The Supreme Court, State of Washington.]

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 29th day of July, 1918.

C. S. REINHART,
Clerk.

[Endorsed:] 327-18/26276.

[Endorsed:] File No. 26,276. Supreme Court U. S., October Term, 1918. Term No. 327. Northern Pacific Railway Co., et al., P. E., vs. Puget Sound & Willipa Harbor Railway Co. Certified copy of Judgment nunc pro tunc. Filed August 6th, 1918.

In the Supreme Court of the State of Washington.

No. 13464.

STATE OF WASHINGTON ex Rel. PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, Defendants.

Stipulation.

It is hereby stipulated by and between counsel for the respective parties herein as follows:

That the railroad of the Northern Pacific Railway Company was constructed at and in the vicinity of the several points of crossing in and about the years 1890, 1891 and 1892 and has been in place at all times since, and the record before the Supreme Court of the State of Washington shows the facts to be as stated, and this stipulation of fact is made for the purpose of shortening the record to be sent up from the Supreme Court of Washington to the Supreme Court of the United States on the writ of error sued out by the Northern Pacific Railway Company and Public Service Commission.

Dated the 1st day of November, 1917.

F. M. DUDLEY,
Attorneys for Plaintiff.
S. B. DA PONTE,
W. V. TANNER,
Attorneys for Defendants.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that by an inadvertence a copy of the enclosed stipulation was omitted from the transcript in the case of the State of Washington ex rel. Puget Sound and Willapa Harbor Railway Company, Plaintiff, vs. Northern Pacific Railway Company and Public Service Commission of the State of Washington, Defendants; and that in pursuance of the Writ of Error, and by direction of the Plaintiff-in-Error, I am now enclosing the above which is a full, true and correct copy of the original stipulation, and which is now on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Washington, this 5th day of June, A. D. 1918.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART.

[Endorsed:] File No. 26,276. Supreme Court U. S. October Term, 1918. Term No. 327. Northern Pacific Railway Company et al., Pl'ffs in Error, vs. Puget Sound & Willapa Harbor Railway Company. Certified copy of stipulation of counsel as to facts. Filed June 11, 1918.

2.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

No. 327.

NORTHERN PACIFIC RAILWAY COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON,

Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY.

Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES W. BUNN,
CHARLES DONNELLY,
LORENZO B. daPONTE,
Attorneys for Northern Pacific Railway Company.

W. V. TANNER,
Attorney General of the State of Washington.

HANCE H. CLELAND,
Assistant Attorney General,
Attorneys for Public Service Commission of Washington.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

No. 327.

NORTHERN PACIFIC RAILWAY COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON,

Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of Washington to review its final judgment instructing the court below to enter judgment directing the Public Service Commission of that state to apportion equally between the Northern Pacific Railway Company and the Puget Sound & Willapa Harbor Railway the expense of installing and maintaining interlocking devices at two points where the tracks of the latter company were to be laid across the tracks of the former.* The facts are as follows:

*The court's *decision* required this (R. 66). The judgment as actually entered (R. 67) remits the case to the Superior Court of Lewis County, Washington, "for further proceedings in accordance herewith." The form of this judgment afforded ground for the argument, especially in view of the concurring opinion of Mr. Justice Holcomb (which seemed to suggest uncertainty as to what might be done below, R. 66), that the judgment was not final. *Haseltine v. Bank*, 183 U. S. 130; *Louisiana Navigation Company v. Oyster Commission*, 226 U. S. 99. Therefore, by consent of all parties, the court below has entered a judgment *nunc pro tunc* as of October 15, 1917, the date of the entry of the original judgment, requiring specifically an equal apportionment of the cost of construction and maintenance of the interlocker between the two companies. This judgment, though not in the printed record, has been certified to and is on file with the Clerk of this Court. It is clearly final. *Rio Grande Western R. R. Co. v. Stringham*, 239 U. S. 44.

The Northern Pacific Railway Company has long owned and operated a line of railroad extending from the town of Chehalis in Lewis County to the towns of South Bend and Raymond in Pacific County, Washington, known as the South Bend-Chehalis Line. In the year 1914 the Puget Sound & Willapa Harbor Railway Company, a subsidiary of the Chicago, Milwaukee & St. Paul Railway Company, was engaged in constructing a line of railroad from Centralia in Lewis County, Washington, to South Bend and Raymond, in Pacific County, generally paralleling and competing with the line of the Northern Pacific Company. In June of that year the Willapa Harbor Company filed with the Public Service Commission of Washington two petitions to be allowed to cross at grade the railroad of the Northern Pacific Company at two points in Lewis County.

On July 20, 1914, a hearing was had on the consolidated petitions. At the hearing, in view of the evidence offered by the Willapa Harbor Company, the Northern Pacific Company admitted that a separation of grades would be impracticable because unduly burdensome and expensive to the Willapa Harbor Company, and consented that grade crossings should be allowed, but insisted they should be interlocked at the expense of the Willapa Harbor Company while that company contended that no interlockers should be required at that time.

At the conclusion of the hearing but before a decision was rendered by the commission the parties entered into a stipulation by which it was agreed that the Willapa Harbor Company would install interlockers at each crossing at its own expense, reserving the right to apply to the commission for an order apportioning

the cost between the two companies in accordance with Sec. 6, Ch. 30, Laws of 1913, of the State of Washington. (R. 14.)

Thereupon the Commission made findings and an order allowing grade crossings, but providing for interlockers to be installed in accordance with the stipulation, and among other matters found that it would cost the Willapa Harbor Company the sum of $348,000 to separate the grades at the points of crossing in excess of what it would cost to construct grade crossings, and even then grades would exist which would increase the cost of operation over the Willapa Harbor Company's line. (R. 17-18.)

The Willapa Harbor Company, insisting that the Northern Pacific Company should bear a proportion of the cost of installing, maintaining and operating the interlockers, and the Northern Pacific Company insisting that the Willapa Harbor Company should bear the entire cost thereof, on January 23, 1915, the latter company filed its petition with the Public Service Commission, praying for an equitable apportionment of the costs (R. 7), and after a hearing the commission made findings, the material parts of which are as follows:

FINDINGS OF FACT.

"(1) That for some years prior to the construction of the Puget Sound & Willapa Harbor Company's line the Northern Pacific Railway Company had been operating its line known as the South Bend-Chehalis Line in Lewis County, Washington.

(2) That prior to the construction of the line of the Willapa Harbor Company there was no necessity for interlocking devices at the points concerning which the dispute now before the commission has arisen, as the crossings under consideration did not exist.

(3) That the installation of interlocking plants is primarily to avoid the cost and delays involved in stopping trains at grade crossings where such plants are not installed and to secure safety in operation.

(4) That aside from the general benefits accruing to the public from the construction and maintenance of the Willapa Harbor Company's railway line, no benefit accrues to the Northern Pacific Railway Company by the maintenance of said crossings.

(5) That the necessity for the maintenance of said crossings and interlocking devices arises by reason of the construction and operation of the line of the Willapa Harbor Company at those particular points and that except for such construction and operation by the said Willapa Harbor Company there would be no occasion for the maintenance of said crossings and interlocking devices.

Wherefore the commission concludes that it would be unreasonable to require the Northern Pacific Railway Company to bear any portion of the cost of construction and installing and maintaining the interlocking devices at the crossing above referred to and an order of the commission will be entered in conformity with the findings and conclusions herein set forth." (R. 26.)

An order was accordingly entered requiring the Willapa Harbor Company to install, operate and maintain the interlocking devices entirely at its expense. (R. 28.)

The only facts additional to those found by the commission that are material to the decision of this case are contained in stipulations of the parties and are as follows:

"That it has been the uniform custom and practice of the various railway companies in this state,

both prior and subsequent to the passage of the Act of 1913, Ch. 30, where one railway company crosses the tracks of another railway company at grade and an interlocking plant was necessary and installed, that the junior company desiring the crossing would pay all of the cost and expense of installing, maintaining and operating such interlocking plant, the senior company not being put to any expense whatever by reason of the installation, maintenance and operation of such interlocking plant.

It is further stipulated that the petitioner offered in this instance to pay the cost of installation, operation and maintenance of the interlocking plant at the crossing involved in this proceeding provided that the Northern Pacific Railway Company would consent to a grade crossing not interlocked until such time as the petitioner should deem an interlocking plant desirable and necessary and install the same, at which time the petitioner offered to pay all the cost of installation, maintenance and operation thereof." (R. 50.)

A further stipulation was entered into that the railroad of the plaintiff in error was constructed in the years 1890, 1891 and 1892 and has been in place at all times since.

The clerk of the Supreme Court of Washington inadvertently omitted to send up this stipulation so it does not appear in the printed record, but has been sent up to be attached to the record by the clerk of this court.

A writ of review was taken by defendant in error to the Superior Court of Lewis County, the Northern Pacific Company and the Public Service Commission both being made defendants. That court affirmed the order of the commission. (R. 55.)

From this judgment an appeal was taken to the Supreme Court of Washington, where the judgment of

the Superior Court was reversed, the court holding that the cost of installation, maintenance and operation of the interlocking devices at the crossings should be divided equally between the two corporations. (R. 59.)

In the court below plaintiff in error contended for two propositions, viz.:

(1) That Ch. 30, Laws of 1913, Rem. & Ball. An. C. & St., Vol. 3, Secs. 8733-1 et seq., provides that the road desiring to cross an existing line should pay the entire cost of construction, maintenance and operation of the crossing and any safety devices required by the commission.

(2) That if the act be construed as requiring plaintiff in error to pay any part of the cost of the interlocking device, under the facts of this case, it would be violative of the 14th Amendment of the Constitution of the United States forbidding the taking of property without due process of law.

The court below rejected both propositions, holding:

(1) That the statute demands an apportionment of the cost.

(2) That such requirement does not make the legislation repugnant to the 14th Amendment. (94 Wash. 10.)

To review this decision the Northern Pacific Railway Company and the Public Service Commission have sued out this writ of error, the latter being empowered to prosecute review proceedings in defense of its orders. *State ex rel Great Northern Ry. Co. vs. Railroad Commission*, 60 Wash. 218.

The constitutional question is the only one open to review in this court and the only question for determination.

ASSIGNMENT OF ERROR.

The State Supreme Court erred in holding and deciding that Ch. 30 of the Laws of 1913, as construed and applied to the facts of this case, is not repugnant to the 14th Amendment to the Constitution of the United States.

AUTHORITIES AND ARGUMENT.

The functions of interlocking plants at railway crossings are so well understood as to require no description. There is a detailed plan attached to the record and a sufficient description of the device in the opinion of the court below. For the purposes of this case suffice it to say that the purpose of these devices is twofold. Firstly, to secure safe operation over the crossing; and, secondly to avoid the necessity of stopping when the crossing is not in use by another train. The latter may be said to be the primary and most important purpose because while a disregard of the signal cannot result in a collision it will certainly result in a derailment, thus substituting the dangers of derailment for those of collision. It may well be a matter of opinion as to which of the two is the greater.

The court below has decided that the statute in question is an exercise of the police power of the state, and so considered does not take property without due process of law. The legislation appears in Rem. & Ball. An. Codes & St. Vol. 3, Supp. 1913, Secs. 8733-1 et seq., and its pertinent provisions are as follows:

Sec. 8733-2 prohibits grade crossings of railroads and highways without authority first obtained from the Public Service Commission.

Sec. 8733-3 provides that when any railroad company desires to cross any highway or railroad at grade it shall file a petition with the commission stating why

a crossing cannot be made above or below grade. If the commission find a grade separation to be impracticable (considering the expense, topography, extent of traffic and dangers of the crossing, etc.) it shall authorize a crossing at grade.

Sec. 8733-6 deals with apportionment of cost and is the one on which the state court's judgment is based and is the provision which we attack as unconstitutional as applied to the case at bar. It is as follows:

> "Apportionment of Cost of Crossing.
>
> Subd. A. Whenever under the provisions of this act, new railroads are constructed across existing highways or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the entire expense of crossing above or below the grade of the existing highway, or changing the route thereof, for the purpose mentioned in this subdivision, shall be paid by the railroad company.
>
> Subd. B. Whenever, under the provisions of this act, a new highway is constructed across a railroad, or an existing grade crossing is eliminated or changed, the entire expense of constructing an overcrossing, undercrossing or safer grade crossing, as the case may be, shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road, between the railroad and the state, as justice may require, regard being had for the benefits accruing to the railroad, municipality, county or state by reason of the improvement. If the highway involved is a state road, the amount not apportioned to the railroad company shall be paid as provided by law for constructing such state road. When an existing grade crossing is ordered eliminated by the construction of an overcrossing or undercrossing, the commission may in its dis-

cretion pay an amount not to exceed ten per cent. of the cost thereof out of the appropriation provided in this act, and in such cases the state auditor is hereby authorized and required upon the requisition of the commission to draw warrants on the state treasury payable to the party designated by the commission for such amount, and the state treasurer is hereby authorized and required to pay such warrants on presentation.

Subd. C. Whenever two or more lines of railroad owned or operated by different companies cross a highway or each other by an overcrossing, undercrossing or grade crossing required or permitted by this act or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county or to the state, shall be apportioned between said railroad companies by the commission unless said companies shall mutually agree upon an apportionment. If it becomes necessary for the commission to make an apportionment between the railroad companies a hearing for that purpose shall be held, at least ten days' notice of which shall be given."

Subd. C, supra, refers particularly to railroads crossing each other, and construing that section the court below held that the crossing there referred to meant not only the crossing proper but as well any protective or safety devices the commission might order to be installed thereat, and that the expense thereof was required by the act to be apportioned between the roads under any and all circumstances.

Passing then to the constitutional question, the court below observes that the right of one railroad to cross another, while guaranteed by the state constitution (Art. 12, Sec. 13), and by express statute (Sec. 8736 R. & B. Code), exists without such guaranty, and might be acquired in condemnation proceedings. It

recognizes, however, that, in the absence of a statute to the contrary, the road seeking the crossing must bear the entire expense, including the cost of an interlocker, or other protective device, where such is required in order to secure a safe crossing; and it cites a long line of authorities in support of the rule thus stated, including several Washington cases, *State ex rel North Coast R. R. Co. vs. Northern Pacific R. Co.*, 49 Wash. 78; *Northern Pacific R. Co. vs. Union Lumber Co.*, 76 Wash. 563, and *Spokane vs. Spokane & I. E. R. Co.*, 75 W. 651. It observes that the grounds upon which some of the cases are rested "lend strong color to the contention of the respondent, but it must be remembered that the cases were determined in the absence of statutes requiring an apportionment of costs and without that thought being in the mind of the court when the opinions were framed." (R. 64.) It then proceeds as follows:

> "A railroad company which has procured a right of way for its line and laid tracks thereover clearly has a vested property right therein, and any other company crossing such right of way is bound to make compensation for the property actually taken and damaged, regardless of any statutory provision to the contrary. But a railway company first in time acquires no exclusive right to the territory through which it passes or exclusive right to operate its road in any particular manner. Both under the principles of the common law and by the express provisions of the constitution and statutes of this state, its line was subject to being crossed by the line of another railroad company. The language of the Supreme Court of the United States in C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226, is applicable. It is there said:
>
> 'The plaintiff in error *took its charter* subject to the power of the state to provide for the safety

of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its track subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the *state shall indemnify* the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of N. Y. & N. E. R. Co. vs. Bristol, 151 U. S. 556, this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection, the court said, cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. See New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650.'

"It is therefore within the power of the state, whenever it deems the public safety may so require, to impose upon railway companies whose

> tracks cross each other at grade the duty of installing and maintaining at such crossing such safety devices as the conditions may require. And since such devices are not necessary to the successful operation of the road but are required for the safety of the public, it would seem to follow that the state might provide, without violating the constitutional inhibition against the taking of private property for public use, that the expense of installing and maintaining such devices could be apportioned between two railway companies, even though the installation is required to be made at the time when the one is constructing a *new track* across the *existing track* of another." . . .

It will thus be seen that the court below rests its decision squarely upon an application of the principle of *C. B. & Q. vs. Chicago, supra,* to which might be added many other cases, to the effect that the citizen must conform to reasonable exertions of the police power to secure the public safety, health and morals.

Here are the points of *C. B. & Q. vs. Chicago*:

> 1. The corporation *"took its charter"* subject to the power of the state to provide for the safety of the public by requiring grade separation at street intersections.
>
> 2. That it is not a condition to the exercise of the police power in that respect that *"the state shall indemnify"* the owners of property from loss or damage due to its exercise.

We submit that these principles have no application to the case at bar, distinguishing *C. B. & Q. vs. Chicago,* and like cases, on the following grounds, viz:

(a) Plaintiff in error did not *"take its charter,"* nor construct its track subject to the right of defendant in error to cross the same, *except upon payment of full compensation* for the costs of such crossing, including

the cost of any protective devices that might be required thereat.

(b) This is not a case of compensation *by the state* for loss due to a legitimate exercise of the state's police power but only involves a question of apportionment of costs *between the two corporations*, a matter in which the state has no interest whatever.

Coming to consider these points in their order:

(a) It appears from the stipulation of facts that plaintiff in error constructed its road in the years 1890, 1891 and 1892, whereas the legislation in question was enacted in 1913. At the time the road was located and constructed the following statute was in effect in this state, viz:

Sec. 8736 R. & B. Code, Act of Feb. 1, 1888.

> "Every corporation formed under this act for the construction of a railroad shall have power to cross . . . any other railway before constructed . . . and every corporation whose railway is, *or shall hereafter be intersected by any new railway*, shall unite with the corporation owning such new railway in forming such intersections and connections; . . . and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, *the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road.*" (Italics ours.)

Under this statute it was, of course, incumbent upon defendant in error to condemn the right to cross, and the Supreme Court of Washington has held squarely that in the eminent domain action the new road must pay the entire cost of the crossing and of an interlocker, where one should be required.

State ex rel North Coast R. Co. vs. Northern P. R. Co., 49 Wash. 78.
N. P. R. Co. vs. Union Lbr. Co., 76 Wash. 563.

It is manifest, therefore, that the plaintiff in error did not *"take its charter"* and *"construct its railroad"* upon condition that it might be crossed upon terms other than the payment of full compensation for the injury, including the entire cost of safety devices that might be required at the crossing; and it follows that *C. B. & Q. R. Co. vs. Chicago*, 166 U. S. 226, is clearly distinguishable from the case at bar in this most important particular.

In the *Bristol* case (also cited by the court below), where the apportionment of the expense of separating grades at street intersections between a highway and several railroads was involved, it is held that the state might make the division between the several railroads as it saw fit, even to the extent of imposing the entire cost on one of them. This is done in the exercise of the police power by and in behalf of the state, but certainly is without application to a case of dividing the expense of separation of grades between two railroads, for no one would venture to contend that the state might, as between these two corporations, impose the entire cost of a grade separation or safety devices on the plaintiff in error, though, under the Bristol case, were a street involved the rule would be otherwise. These views are in accordance with ancient principles of the common law, for, at common law, where a new *way* crossed an old one of the *same nature* it must do so with the least possible injury, and the owners of the new way were obliged to bear the expense of making the crossing safe. The courts have never applied this rule to the crossing of a street by a railroad, because though both are "ways" they are *not of the same nature*

(*State vs. R. R. Com.*, 121 N. W. 921-924). The crossing of one railroad by another, is, however, the crossing of two "ways" *of the same nature or kind*; and to such a crossing the common law rule applies.

That there is no analogy between cases like the foregoing and the case at bar, is at once apparent upon considering that it has always been held that the entire cost of grade separations at *highway* crossings may be imposed on the railroad company, regardless of priority in time. A later and extreme example of this principle may be found in *M. P. R. Co. vs. Omaha*, 235 U. S. 121.

(b) Neither is this a case where a claim is made of *"compensation from the state"* for loss sustained in the interest of the state, as in case of separation of grades at highway crossings, within the reasoning of *C. B. & Q. vs. Chicago*, and similar cases. In those cases the claim was for "compensation from the state" for expense incurred in obedience to the police regulations of the sovereign authority. The compensation claimed was *from the state, or its agency*, a municipal corporation. But in the case at bar we make no claim of compensation from the state. We claim compensation from only a corporation. The two corporations stand towards each other exactly as two private individuals; and the state has no interest whatever in the question which of them shall pay for making the crossing safe.

We submit, therefore, that cases having to do with a crossing of a street by a railroad have no application to the crossing of one railroad by another. Authority is not wanting in support of these views, as we shall see.

The case of *State ex rel N. P. Ry. vs. R. R. Com.*, 121 N. W. 919 (Wis.) is identical in all of its

features with the case at bar. The cases involving highway crossings were there cited in support of the claim of the junior road for apportionment of the cost of the interlocker, but the court say: (P. 925.)

> "Counsel for respondent seek to support their position on the authority of cases regarding public street crossings. But the distinction between the two classes of cases is quite clearly marked. In the first place, the ways . . . are not of the same general nature. Among other points of distinction which may be suggested it may be observed that a street or public highway is opened and used, not for revenue, but solely for the benefit of the general public. While it is true that a railroad has some of the attributes of a public highway, in that it is a common carrier of freight and passengers, yet it is owned by private parties and operated and used as other private property for gain, subject to public control because devoted to a public purpose. And so the common law rule respecting the distribution of burdens caused by the crossing of 'ways' has been held to apply to 'ways' of the same general nature."

And in support of this distinction many authorities are cited from all of which it appears that the rules for the admeasurement of compensation in proceedings by the state to open highways over railroads are essentially different from those applying where one railroad corporation seeks to build its track over the existing track of another. In the latter instance the rule deducible from all authority is aptly stated in a New Jersey case as follows:

> "There seems to be no equitable ground which requires the senior company presently in occupation to pay anything to enable the junior company to construct its own crossing in such a manner that it shall not impair rights of the senior com-

> pany already vested and in enjoyment. It is the duty of the junior company so to build its tracks over the senior company's rails that the crossing may be safe." *West etc. R. Co. vs. Atlantic etc. Co.*, 65 N. J. Eq. 622.

Neither is there any question of exercise of the police power in the interest of the state. The question here is one of private interest only, viz., as said in *State vs. R. R. Commission, supra*, "one of distribution of burdens between the junior and senior roads." It is a matter of ascertaining the compensation to which plaintiff in error is entitled from defendant in error, and not at all a matter of demanding or receiving compensation from the state because of a legitimate exercise of the state's police power.

We submit, therefore, that *C. B. & Q. vs. Chicago*, and like cases, have no application; and we proceed now to consider whether, under general law, the judgment in question takes property without due process of law, in violation of the Fourteenth Amendment.

When the railroad of plaintiff in error was constructed Sec. 8736, hereinbefore quoted, was in full force and effect. While this section guarantees to defendant in error the right to cross, it was only upon condition that *full compensation* should be paid to plaintiff in error, including the cost of an interlocker, should one be required. This was the admitted rule in this state prior to the passage of the Act of 1913. *State ex rel North Coast R. Co. vs. Northern P. R. Co.*, 49 Wash 78.

Under these circumstances plaintiff in error had a vested right of which it could not be deprived by subsequent legislation.

State ex rel N. P. R. Co. vs. R. R. Com., 121 N. W. 919 (Wis.).

This case is directly in point. There the Northern Pacific Railway Company built its line while there was in effect a statute of Wisconsin identical with our Sec. 8736, as construed and applied by the Washington court in *North Coast R. Co. vs. N. P. R. Co.*, supra. Thereafter the legislature enacted a statute like the one here in question. Under the later enactment the railroad commission of Wisconsin permitted the construction of a new railroad over the tracks of the Northern Pacific, but provided for an interlocker to be installed at the joint and equal expense of the two companies. The Northern Pacific Company appealed, contending that if the Wisconsin statute authorized the order of the Commission it was repugnant to the first clause of the Fourteenth Amendment. It was contended by the junior company that the statute, as thus construed and applied, was valid on two grounds, first, as an amendment to the charter of the corporation; and, second, as a legitimate exercise of the police power. Both points were denied by the Wisconsin court in an able and exhaustive opinion which leaves nothing to be added from our point of view. We confidently submit this case as a complete and unanswerable argument in favor of our contention in the case at bar.

In *C. M. & St. P. R. Co. vs. Old Colony Trust Co.*, 216 Fed. 577 (CCA Iowa), a contract between the railway company and an electric line required the latter to pay the entire cost of constructing and reconstructing a crossing, including an interlocker, in consideration of which the railway company granted a right of way over its tracks. The electric line subsequently refused to abide by the con-

tract, contending that it was inequitable and void for want of consideration, in that the statutes of Iowa granted it the right to cross, which was all that it acquired by the contract. Construing the Iowa statute, similar to our Sec. 8736, and in answer to the argument, the court say:

> "This language certainly contains no warrant for saying that the electric company can carry its railway across, over or under the tracks of the St. Paul Company at the expense of the latter. Again, in order that this section of the code (giving the right to cross) may be held to be valid legislation, it must be construed with reference to the fundamental law of Iowa and of the United States prohibiting the taking of private property for public use without just compensation."

The precise question here presented is one of first impression in this court. The only case having to do with distribution of burdens between two railroads is *D. F. & W. R. Co. vs. Osborn*, 189 U. S. 383. In that case the commissioner of railroads, by virtue of appropriate legislation, required an electric line and a steam railroad to provide safety devices at a point of intersection of their lines with a public highway in the City of Detroit. The electric company contended in the state court and in this court that it was the senior line and that the necessity for safety devices at the crossing arose because of the subsequent construction of the steam railroad without at the time making provisions for safeguarding the crossing, and therefore the order requiring it to participate equally in the expense was a taking of property without due process of law. The state court recognized the rule contended for by the senior line as applied to cases where the safety devices were ordered at the time the junior road was constructed, using this language: (P. 388.)

> "An examination of these cases will show they were all cases where it was sought to obtain a right of way either for a railroad across a highway, or for a highway across a railroad, or a crossing for one railroad over the right of way of another; and none of the cases relate to the question involved here, as to who shall bear the expense of additional safeguards ordered upon roads *which have crossed each other for a long period of time.*"

The state court then proceeds to consider the rule to be applied in such case, and uses the following language:

> "When the right to use the crossing is once acquired, the right of the several corporations to this use is reciprocal, so far as is consistent with the kind of use made of the crossing by them. . . . When the joint use of a crossing is obtained, is the position tenable that, because one road is older than another, the junior road must not only compensate the senior road for its present damage before it can cross, but for all time it must bear any additional future cost which may be made necessary by the erection and maintenance of appliances for the safety of the public, resulting from the increased use of the crossing. We think it logically follows from what has already been said the question must be answered in the negative." *Detroit etc. R. Co. vs. Osborn*, 86 N. W. 842, 845.

And so the state court held that, having obtained the right to cross and laid its rails the junior road was *thereafter* on an equality with the senior, and the latter might be required to contribute its just proportion of the cost of providing safety devices resulting from the increased use of the crossing by the two roads, or other changed conditions necessitating proper

safeguards to protect the public using the crossing. The state court's decision was affirmed by this court, but the distinction between a case where safety devices are required at *existing* crossings and a case where they are necessitated *by the original construction of the junior line,* is recognized by this court, as the following quotation makes manifest:

> "The conditions which exist today could not have been contemplated years ago, or be the measure of the rights and relations of the respective roads. Those rights and relations were necessarily determined *at the time the crossings were made.* What could not be foreseen could not have been made a ground of action, and if the growth of business and population can give rights to either of the bisecting roads it is not clear how the police power of the state can be limited in its control over either of them." (P. 388.)

The distinction between existing crossings, like the one involved in the *Osborn* case, and new crossings, such as is involved in the case at bar, has always been recognized. *State ex rel N. C. R. Co. vs. N. P. R. Co.,* 49 Wash. 78. In that case the judgment below to the extent it required the junior road to install interlockers at any time in the future should the senior road build additional tracks, was reversed, the court saying:

> "It may be that changed conditions at the time the defendant desires to construct the additional tracks will render it inequitable that the relator provide and maintain the devices found necessary to safeguard the crossings; or it may be that the relator, when it makes the defendant whole for the present damage, has done its full duty, and from thence forth stands on an equal footing with the defendant, and that justice will require that

> the cost of maintenance of safeguards made necessary by the changed conditions shall be borne by both companies, or by that company for whose benefit it is installed."

In *L. S. & M. S. R. Co. vs. C. S. & C. R. Co.*, 30 Ohio St. 604, 616, the court say:

> "When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public, to so use this common right as to do no unnecessary harm to the other or to the public. . . . When the appropriation is made, paid for, and put to the new use, both companies stand on a perfect equality as to rights and privileges in the use of the crossing."

It seems quite clear, therefore, that the *Osborn* case in this court is not at all controlling. The distinction is real and substantial. That case is identical with *S. & I. E. R. Co. vs. Spokane*, 75 Wash. 651, where the City of Spokane required the S. & I. E. R. Co., the Northern Pacific R. Co. and the C. M. & St. P. R. Co. to separate the grade of their tracks from the grade of a city street, each company to contribute to the cost in an equitable proportion. While the ordinance was held void for want of form, the power of the City to pass a proper ordinance was sustained by the supreme court of the state, and this company did not contend in that case that the question of seniority was material to relieve it from a proper proportion of the cost. In fact, under the *Bristol* case, the city might have imposed on either of the companies the entire cost, regardless of the matter of priority in point of location of its line.

This brings us to our last point of distinction between the case at bar and all other adjudged cases, viz.

Where both roads are constructed under a statute requiring participation in cost of safety devices the matter of seniority is immaterial. Such a statute is undoubtedly valid legislation as applied to all railroads built after its enactment. This is manifestly true, because if a railroad company build a line after the enactment of such an act it does so subject to the conditions imposed by it. The statute is valid and reasonable as a condition annexed to the right to build and operate a railroad in this state. *Toledo etc. R. Co. vs. Lima & T. T. Co.*, 86 N. E. 515 (Ohio) is a case of that kind. It has no application to the case at bar because both roads would appear to have been constructed after the passage of the statute requiring an apportionment of costs.

From what has been said it will be seen that the legislation in question is valid in its most general application, viz: It is valid as applied to crossings between railways and highways; as applied to existing railroad crossings, and as applied to all lines constructed after its enactment. But we insist it is invalid as applied to the case at bar, where plaintiff in error's road was constructed at a time when the state law prohibited any part of the burden in question being imposed upon it. (*State vs. R. R. Com.*, 121 N. W. 919.)

It appears from the record that the grade crossing, necessitating the safety devices, was applied for by defendant in error because the cost of a separation of grades would be prohibitive. It would cost that company the sum of $348,000 to separate grades over the cost of a crossing at grade (R. 17). Suppose an overhead crossing had been required by the commission at a cost of $348,000 would it be contended that one half of such cost could be imposed on plaintiff in error? It could not be successfully, because the state court has

held that the crossing proper, as distinguished from the safety devices, must be constructed at the expense of the junior road. Now the grade crossing, with an interlocker, results in a saving to defendant in error of $348,000 according to its own contention. On the other hand, the grade crossing is in any event, and under all circumstances, a detriment to the existing line; yet plaintiff in error is burdened with one-half the cost of construction, maintenance and operation of the device. Thus a result is achieved shocking to an elementary sense of justice and in derogation of common right.

While it may not be the function of the Fourteenth Amendment to enforce the individual sense of abstract justice, yet there is authority for saying that the test of legislation, viewed in the light of that Amendment, is its reasonableness, as applied to the facts of a given case. *Gundling vs. Chicago*, 177 U. S. 183; *Mountain Timber Co. vs. Washington*, 243 U. S. 219. It seems true to say, therefore, that the legislation in question, as construed and applied in this case, cannot be sustained as a reasonable and legitimate exercise of the police power, but is so arbitrary, unreasonable and oppressive as to amount to a taking of property without due process of law, and an unconscionable and unjustifiable invasion of private right. The judgment under review is in no sense in the public interest. The sole beneficiary is a private corporation. How can it be said with any pretense of truth that the public interest is involved in the matter of the apportionment of these costs between the two corporations? If the public interest be involved in this case how is it that we find the Public Service Commission appealing from the judgment? Defendant in error chose its location and route, considering only its own pecuniary advantage. The plaintiff in error was not consulted. It

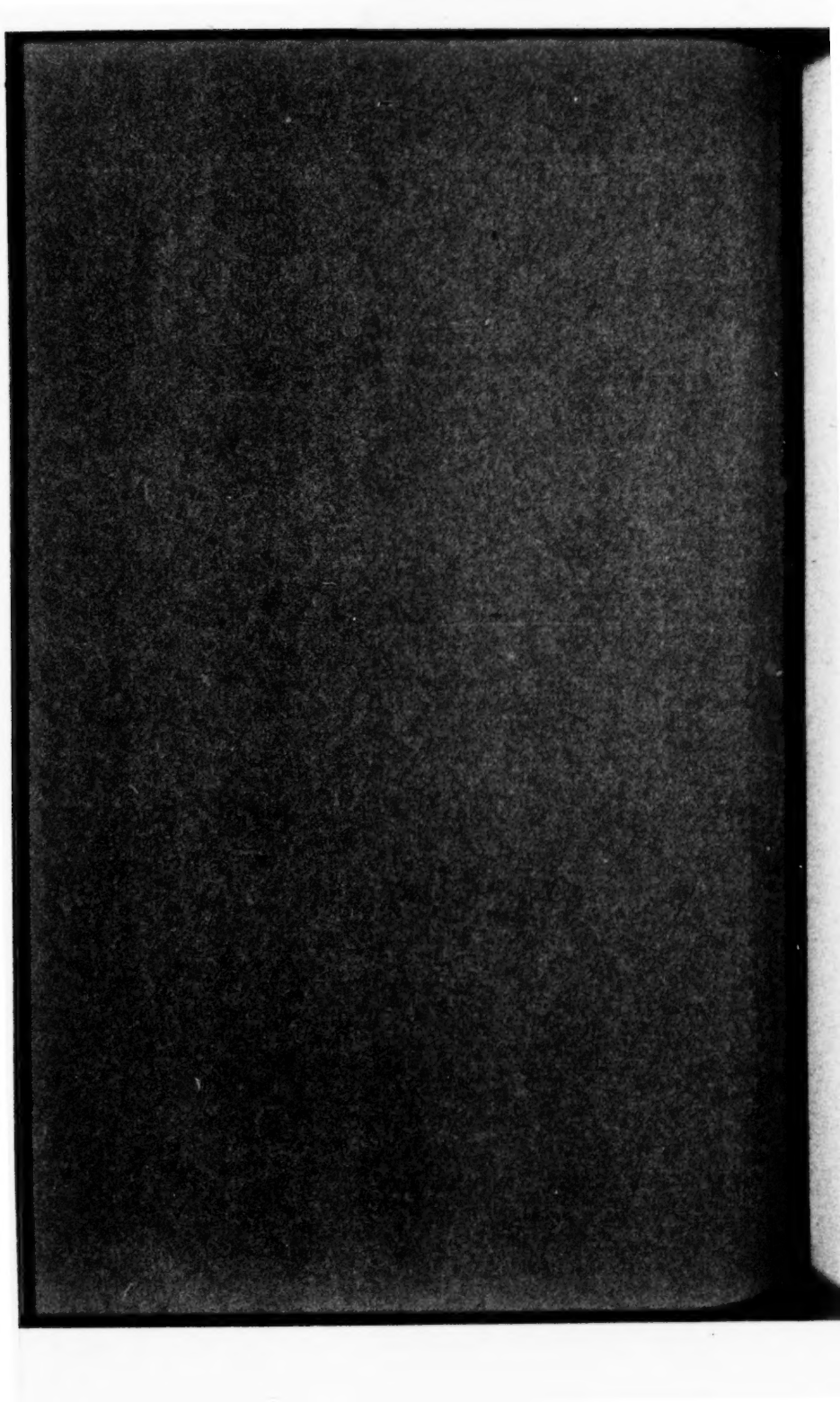
might well be that a slight change in route would obviate the necessity of a crossing at all, or might make an overhead crossing entirely practicable. As to such matters, however, this company has no right or opportunity to be heard. It results that defendant in error, having located its road to suit its own interest, having been allowed a grade crossing because a separation of grades would cost an additional $348,000, is permitted to burden plaintiff in error with half the cost of constructing safety devices made necessary solely because it has been permitted to construct its line in such wise as to save that expenditure. Now to say that this is in the public interest, and therefore permissible, is manifestly incorrect. It is solely in the interest and for the pecuniary advantage of defendant in error. Neither the police power nor the public welfare is in the least involved. The plain truth is that plaintiff in error is stripped of its property for the private, pecuniary advantage of defendant in error.

We submit that the judgment below takes property without due process of law, and pray that it be reversed.

Respectfully submitted,
CHARLES W. BUNN,
CHARLES DONNELLY,
LORENZO B. daPONTE,
Attorneys for Northern Pacific
Railway Company.

W. V. TANNER,
Attorney General of the
State of Washington.

HANCE H. CLELAND,
Assistant Attorney General,
Attorneys for Public Service
Commission of Washington.



INDEX

CITATIONS.

Cases.

STATUTES.

CONSTITUTION OF WASHINGTON.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

NORTHERN PACIFIC RAILWAY COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, *Plaintiffs in Error,* vs. PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY, *Defendant in Error.*	No. 327.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT

An act aproved March 6, 1913 (Laws of Washington, 1913, page 74) regulating crossings by railroads of other railroads, and of highways, and by highways of railroads, provides (omitting the provisions as to highways) as follows:

"Section 2. All railroads and extensions of railroads hereafter constructed shall cross existing railroads by passing either over or under the same, when

practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so.

* * * Provided, That this section shall not be construed to prohibit a railroad company from constructing tracks at grade across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad; the grade and alignment of the railroad; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry.

"Section 3. Whenever any railroad company desires to cross any railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade. * * * * * * * * * * Upon receiving such petition the commission shall immediately investigate the same, giving at least ten days' notice to the railroad company * * * affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard. * * * * * * * *

The evidence introduced shall be reduced to writing and be filed by the commission. If the commission finds that it is not practicable to cross the railroad either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing. *The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or*

other devices or means to secure the safety of the public and its employes."

* * * * * * * * * * * * * * * * *

"Section 6. * * * * * * * * * * * * *

Subdivision C.

Whenever two or more lines of railroad owned or operated by different companies cross a highway, or each other, by an overcrossing, undercrossing or grade crossing required or permitted by this act or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county, or to the state, *shall be apportioned between said railroad companies by the commission unless said companies shall mutually agree upon an apportionment.* If it becomes necessary for the commission to make an apportionment between the railroad companies, a hearing for that purpose shall be held, at least ten days' notice of which shall be given."

(3 Remington & Ballinger's Codes and Statues Secs. 8733-2, 3, 6-C.)

In June, 1914, the defendant in error, hereinafter referred to as the "Willapa Company," being engaged in the construction of a railway, which intersected at two different points a railway line owned and operated by the plaintiff in error, hereinafter referred to as the "Pacific Company," petitioned the Public Service Commission of the state, pursuant in this statute, for permission to cross the Pacific Company's line at grade. By order of October 30, 1914, the Commission authorized such grade crossings subject, however, to the condition "that there shall be installed for the protection of said crossing an interlocking device at each thereof."

The order further provided "that in the event that the said railway companies shall be unable to agree between themselves as to an apportionment of the cost and expense of said crossings including the installation, maintenance and operation of said interlocking plants, that then either of said parties may file a further petition herein for the proper apportionment of said costs and expense." (See Exhibits B and C, Tr ff. 25-36.) The parties being unable to so agree, the Willapa Company filed its petition for such apportionment by the Commission. (Exhibit W, Tr. ff. 13-16.) After hearing, the Commission made findings, conclusions and an order by which it imposed the entire costs on the Willapa Company (Exhibits Y and Z, Tr. ff. 40-45.) The Commission found "that the installation of interlocking plants is primarily to avoid the cost and delays involved in stopping trains at grade crossings where such plants are not installed, and to secure safety in operation"; that no benefit accrued to the Pacific Company by the maintenance of the crossings; that the necessity for the crossings and interlocking devices arose because of the construction and operation of the Willapa Company's line; and that therefore it would be unreasonable to require the Pacific Company to bear any part of these costs. This order was, on writ of review sued out by the Willapa Company, affirmed by the Superior Court. (Tr. ff. 91-92.) From this judgment of affirmance the Willapa Company appealed to the Supreme Court. That court, reversing the construction placed upon the statute by the Superior Court, held that it required the costs of the interlocking device to be apportioned between the parties; that such statute was within the constitutional powers of the state; and that upon the record the costs in question

should be divided equally between the companies. (Tr. ff. 98-99). 94 Wash. 10. A re-hearing before the Court *en banc* was granted; but the Court adhered to the opinion therefore filed. (Tr. f. 99.) 97 Wash. 701. Judgment was accordingly entered which, as amended, directed the Superior Court to require the Public Service Commission to apportion the costs in question equally between the parties. The Pacific Company thereupon sued out this writ of error, the sole error assigned being that the Court erred in holding that the statute, as construed and applied to the facts of this case, was not repugnant to the Fourteenth Amendment to the Federal Constitution.

POINTS AND AUTHORITIES.

I.

THE STATUTE IS A VALID EXERCISE OF THE POLICE POWER.

We desire to call attention at the outset to certain indisputable and undisputed legal propositions which, as it seems to us, are controlling:

1. The state may in the exercise of the police power establish all regulations that are reasonable necessary to secure the health, safety, good order, comfort, or general welfare of the community.

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558.
Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67, 76-7.

C. B. & Q. Railway vs. Drainage Comm'rs., 200 U. S. 561, 592.

Lake Shore & Mich. So. Ry. v. Ohio, 173 U. S. 285, 292.

2. Valid regulations enacted pursuant to this power, that is those designed to promote the health, comfort, safety or welfare of the community, those which are not arbitrary, but which have a real and substantial relation to the avowed purpose, are not within the constitutional prohibtions against the taking of property without due process of law or the impairment of contract obligations, although such regulations may operate to limit or burden the use of property, impair or even destroy its value, require the expenditure of money to comply therewith, or invalidate contracts previously lawful.

Mugler v. Kansas, 123 U. S. 623, 629.

Nashville &c. Railway v. Alabama, 128 U. S. 96, 101-2.

N. Y. & N. E. Railroad v. Bristol, 151 U. S. 556, 557.

Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226, 252 et seq.

Chicago, B. & Q. R. R. v. Nebraska, 170 U. S. 57, 73-4.

New Orleans Gas Co. v. Drainage Comm., 197 U. S. 453, 461-2.

Chicago, B. & Q. R. R. v. Drainage Comm'rs., 200 U. S. 561, 593-4.

Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 594 et seq.

Cincinnati I. & W. Ry. v. Connersville, 218 U. S. 336, 343.

Grand Trunk Ry. v. Indiana R. R. Comm., 221 U. S. 400, 404.

Chicago, M. & St. P. Ry. Co. v. Minneapolis, 232 U. S. 430, 438, et seq.

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558-9.

Mo. Pac. Ry. v. Omaha, 235 U. S. 121, 127.

Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67, 76-7.

Manigault v. Springs, 199 U. S. 473, 480. .

Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 480 et seq.

3. The police power is a continuing power; and the Pacific Company acquired and holds its railway subject to the exercise thereof not only in respect to the conditions existing at the time of the construction or acquisition of such railway, but also in respect to such new conditions as may thereafter arise.

Chicago B. & Q. R. R. v. Chicago, 166 U. S. 226, 252 et seq.

Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 594.

Cincinnati I. & W. Ry. v. Connersville, 218 U. S. 336.

Chicago, M. & St. P. Ry. v. Minneapolis, 232 U. S. 430, 438.

4. The Pacific Company not only acquired and holds its railway subject to such police regulations as the state may ordain but also subject to the establishment by other companies of railway crossings thereover. Such right, says the Supreme Court of Washington, exists

without a special reservation thereof. (Record, ff. 98d-98e, p. 63.) The matter was, however, too important to the public welfare to be left open to any question; and a law enacted by the territorial legislature provided:

> "Every corporation formed under this chapter for the construction of a railroad shall have the power to cross, intersect, join and unite its railway with any other railway before constructed at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the object of its connections, and every corporation whose railway is, or shall be hereafter intersected by any new railway, shall unite with the corporation owning such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefore, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road."
>
> Act approved Feb. 1, 1888, Laws of 1887-8, p. 64.

Except as affected by the constitutional provisions hereafter referred to, this act remained unmodified until the act of 1913 under which the present controversy arises, and was carried into Remington & Ballinger's Codes of Washington as section 8736. It should be noted that the act of 1888 was in the form of granting a charter right to be exercised by "every corporation formed under this chapter for the construction of a railroad."

When the constitution was adopted, in 1889, the obligation of every railway company to hold its property subject to be crossed by later railways, was embodied in that instrument, thus removing it from the posibility of a legislative waiver. It was not only so made permanent, but it was put in the form of a grant of power to all railway companies, whether organized under the laws of the state or not.

> "All railroad, canal and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same is now constructed or may hereafter be constructed, to intersect, cross, or connect with any other railroad, and when such railroads are of the same or similar gauge they shall, at all crossings and at all points where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination."
>
> Constitution, Art. XII, sec. 13.

While this provision, unlike the statute, took no cognizance of the question of compensation to the senior line for the exercise of such reserved rights of crossing, section 16 of Article I of the constitution provided that "no private property shall be taken or damaged for public or private use without just compensation having

been first made, or paid into court for the owner." And the two provisions are, of course, to be construed together. But subject to the payment of whatever compensation might be required under the provisions of section 16, Article I, (with which, however, this case is not concerned) section 13 of Article XII, by granting to all railway companies the right to cross other railways with their roads, subjected all senior lines to such right.

5. That regulations enacted in the interest of the public welfare controlling the construction and operation of railway crossings, are within the police power, and that the crossing statute of Washington is such an enactment, cannot be doubted.

These five propositions are conceded on behalf of the Pacific Company by the express admissions, (a) that the state may constitutionally require the cost of protection of an *existing* crossing to be apportioned between both parties, regardless of priority of the railway construction; and (b) that a statute requiring such apportionment is valid as to all railways constructed after the passage of the act. (Brief of Plff. in Error, p. 23.)

The contention that the regulation apportioning these costs is unconstitutional where there is a new crossing established over a railway constructed before such regulation was enacted, coupled with the admission that such a regulation is valid as applied to an existing crossing, an admission compelled by the decision of this court in *Detroit &c. Ry. v. Osborn*, 189 U. S. 383, requires a distinction growing out of the situation of the parties upon which the unconstitutionality

of the regulation in the one case may be predicated consistently with its admitted constitutionality in the other, a distinction which must affect the *constitutional* rights of the parties, a distinction by which, under the single assignment of error in the present record, the expense of providing the necessary safety device constitutes a taking of property without due process of law in the one case, while it does not in the other. We are unable to see that such a distinction exists. The necessity for and purpose of the expenditure are the same in each case, viz: to diminish or obviate the danger and burdens attendant upon the unprotected crossing. The regulation is enacted by the state in the exercise of the same legislative authority, the police power. Upon what ground, then, can it be reasonably claimed that there is a wrongful taking in the one case and not in the other?

Counsel claim a distinction upon the ground that in the case of existing crossings, the junior company having presumptively lawfully acquired the right to cross by payment of compensation to the senior company for the property taken or damaged, the rights of the parties are upon an equality, and that, therefor, they may be equally subjected to burdens imposed under the police power; but contend that until this basis of equality of right is reached, the imposition of such burdens with respect to the contemplated crossing upon the senior company deprives it of its property without due process of law. There are several answers to this:

First. The argument fails to take cognizance of the time and means by which the equality of right between the two parties is established. Manifestly such

equality cannot be based upon any lapse of time *after* the establishment of the crossing; for presumptively the junior company has by contract or eminent domain proceeding acquired the legal right to install the crossing before it is installed. It cannot be based upon the actual physical installation of the crossing, for such installation to be valid at all must itself be made pursuant to rights previously acquired. This equality, therefore, must arise at the time and as the result of the agreement or proceedings by which the right to install the crossing is acquired. This being so, if the power of the state to impose burdens for the protection of the crossing upon the senior company is dependent upon the existence of equality of right in the crossing, the condition is satisfied and the power complete in each new crossing before it is established.

Further, if equality of right is the basis of the power, such equality must limit the exercises of such power, and the apportionment must in all cases be equal. But this is not essential to the constitutionality of such provisions.

N. Y. & N. E. Railroad Co. v. Bristol, 151 U. S. 556, 567, 570.

Chicago &c. Railroad v. Nebraska, 170 U. S. 57, 76.
Mo. Pac. v. Omaha, 235 U. S. 121, 129.

Second. The argument is self destructive. Conceding, as it does, that when equality of right in the crossing is established burdens for the protection thereof may lawfully be imposed on the senior company, the question becomes one of the establishment of such equality of right. Such equality results, as stated, whenever the junior company acquires the right to install the

crossing. Disregarding rights acquired by agreements the terms of which may, except as restrained by law, be infinitely varied by the concurrence of the contracting parties,—also because there is no claim that there is any contract limiting the rights of the Willapa Company—such equality of right is acquired under section 16, Article I, of the constitution of Washington and the laws enacted pursuant thereto authorizing condemnation of property for public use, whenever the junior company shall have paid the compensation, judicially determined to be just, for the property taken or damaged. As thereafter burdens may be lawfully imposed upon the senior company for the protection of the crossing, the compensation for such burdens, if it is entitled to any, must be recovered in such proceeding; and the question is merely one of whether such burdens, imposed in the exercise of the police power, are elements of damage for which compensation must be made in acquiring the right to install the crossing. If such burdens constitute a constitutional taking of property compensation therefor must be allowed; if they are not such a taking, such compensation should not be allowed. But in neither event would the statute or order imposing such burdens violate the prohibition against taking property without due process. It is interesting to note that this is the conclusion of the court in *State ex rel. N. P. Ry. v. R. R. Com.*, 140 Wis. 145, 167; 121 N. W. Rep. 919, 927, the case principally relied upon by counsel.

Neither is there any basis in the present case for the doctrine contended for. Upon this theory, the contention in this case that these burdens are wrongfully imposed upon the Pacific Company must be postulated upon

the supposition that the Willapa Company has not, by contract or eminent domain proceedings, acquired an equal right in these crossings. But there is nothing in the record to support such supposition. The record assumes throughout that the right of crossing has been acquired; and the acquisition of such right is in no way involved in this action.

Third. A complete answer to this attempted distinction, and one that is more satisfactory in that it does not relegate the question of the right of the senior company to compensation for such burdens to further litigation, is that the police power of the state is not less with respect to new crossings than it is with respect to those already established, and the obligation of uncompensated obedience by the senior company to regulations for the welfare of the public in connection with such new crossing, is identical with its obligation with respect to existing crossings. The Pacific Company, acquired its right to hold and operate its railway, subject to its being crossed by other railways and to the right of the state to prescribe regulations for the public welfare controlling the establishment and operation of such crossings. If by the exercise of the right of crossing reserved for the public benefit, a condition is created calling for the exercise of the police power to secure the public welfare, the senior company cannot complain of burdens imposed upon it under such power, for its obligation to bear such burdens is one of the conditions under which it holds its franchise and property. There is therefore in the imposition of such burden no element of a taking.

Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226.

is controlling. In that case the city of Chicago condemned a right of way for a street across the railway. The opening of this street would necessitate the construction of gates and a tower for operating them, planking the crossing, and other changes required for the protection thereof. The railway company contended that it was entitled to show that it would be compelled to install and maintain these improvements, as elements to be considered in fixing the compensation which should be allowed it in the condemnation proceeding, but the Court said:

> "The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute." (P. 250.) * * *

> "The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The Company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate this use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of

the constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the public." (P.252.) * * *

"The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of the public highway, under legislative sanction, and must be deemed to have been taken by the Company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained, and all that was obtained, by the condemnation proceedings for the public, was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people." (p. 255).

These principles have been repeatedly reaffirmed by this court:

Northern Pacific Railway v. Duluth, 208 U. S. 583.
Cincinnati I. & W. Ry. Co. v. Connersville, 218 U. S. 336.

C. B. & Q. Railway v. Drainage Comm'rs, 200 U. S. 561.

C. M. & St. P. Ry. Co. v. Minneapolis, 232 U. S. 430.

This doctrine is sustained by a majority of the state supreme courts, including the Supreme Court of Washington.

Counsel contend that these principles are not applicable to the case at bar upon two grounds:

(a) That the Pacific Company did not take its charter or construct its track subject to the right of defendant in error to cross its track, except upon payment of full compensation for the costs of such crossing, *including the costs of any protective devices that might be required thereat.*

(b) That this is not a case of compensation by the state for loss due to the exercise of the state's police powers, but only involves a question of the apportionment of such costs, a matter in which it is said the state is not interested.

(a) In support of the first ground the territorial act of Feb. 1, 1888 is relied upon. This act, heretofore quoted, provides:

> "If the two corporations cannot agree upon the amount of compensation to be made therefor, (for the right of crossing), or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road."

There is here no reference to the costs of crossing, much less any reference to compensation for the costs of protective devices which may be required under the

police power. The legislature was concerned with providing a forum by which differences as to the amount of compensation, and the points and manner of the crossings, should be determined. It did not undertake to prescribe any measure of damages or what should be considered in determining them, but left such matters to be determined by the courts under the general rules of law, which rules do not include compensation for the cost of protective devices required under the police power.

It is thought, however, that the act derives some additional force by virtue of the decisions in *State ex rel. North Coast R. v. Northern Pacific Ry. Co.*, 49 Wash. 78, and *N. P. Ry. Co. v. Union Lbr. Co.*, 76 Wash. 563. Neither case involved any question under this crossing act. Although the opinion in the *Union Lumber Co. case* was rendered December 5, 1913, it was on an appeal from a judgment entered November 11, 1912, and thus presented no question arising under this act which was approved March 6, 1913. It is sufficient to say with respect to that case, that it has no application to any of the propositions here involved save in so far as it may be considered an approval of the earlier ruling in 49th, Wash. 78.

State ex rel. North Coast R. v. Northern Pacific Ry. Co., 49 Wash. 78, was a proceeding to review a judgment entered in an eminent domain proceeding to acquire a right of crossing by the North Coast Railroad over the Northern Pacific Railway. There was no question of statutory rights or obligations involved. The trial court required, *as a condition of granting the crossing right*, that the junior company construct, main-

tain and operate, an interlocker at its sole cost. The junior company complained of so much of the decree as imposed upon it the cost of maintenance and operation thereof. The supreme court affirming the decree in part, said: "That the burden of maintaining an interlocking device at the point of crossing of these roads is an actual damage to the defendant company cannot be questioned." But that it did not intend to pass upon the question as to whether this was a taking or damaging within the meaning of the constitutional provision requiring compensation therefor, it made clear by this language:

> "The relator placed its reliance upon the cases of Lake Shore etc. R. Co. v. Cincinnati etc. R. Co., 30 Ohio St. 604 * * . But these cases are founded upon statutes which expressly provide that the expense of maintaining the crossing devices shall be apportioned between the roads.
>
> *Whether such a statute would or would not be in comformity with our constitution we need not now inquire. But the fact that the cases were based on a statute deemed constitutional places them outside the question presented here.*" P. 86.
>
> (The italics are ours.)

While in the case at bar where the constitutionality of such statute was squarely presented, the court held it to be constitutional, and distinguished the earlier rulings upon the ground that "it must be remembered that the cases were determined in the absence of statutes requiring an apportionment of costs and without that thought being in the mind of the court when the opinions were framed." (Tr. ff. 98e.) This ruling is conclusive that the imposition of such costs upon the senior

company is not a taking or damaging of property as those terms are used in the state constitution.

(b) The contention that the constitutional rights —and it is with these only that the court is concerned— are to be differentiated upon the basis of the character of the party by whom the compensation is to be made, is wholly without merit. The apparent basis of this suggested distinction is that while the state is interested in the expenditure of public moneys and may, therefore, for the protection of the public funds, impose the burdens of the protective devices upon the senior way, it is without interest, as between two private or quasi-public corporations, as to which shall bear the burden of the protective devices required; and that this lack of interest so limits the exercise of the police power as to preclude the state from making or requiring any apportionment between the parties. But this ignores the relation of the senior company to the crossing and entirely misapprehends the scope of the police power. The senior company is responsible for the safe operation of its line under all conditions which may lawfully exist, including its safe operation over intersecting tracks lawfully constructed. It is therefore subject to the control of the police power with respect to such crossings and to regulations enacted for their protection. The danger arises from the operations of both lines, the senior as well as the junior, over the common territory. It is caused by both.

Detroit &c. Ry. Co. v. Osborn, 189 U. S. 383, 390.

This being so, the power of the state to impose the

burdens of the protective devices upon either or both of the parties, is settled.

N. Y. & N. E. Railroad Co. v. Bristol, 151 U. S. 556, 566-7.

Chicago, &c. Railroad v. Nebraska, 170 U. S. 57, 74-5, 76.

Mo. Pac. Ry. v. Omaha, 235 U. S. 121, 129.

There is, in the brief of the Pacific Company, a suggestion that by the construction of its railway it secured a vested contract right under the Act of Feb. 1, 1888, to hold its property free from obligations to contribute to the expense of protective devices which the state might require installed at crossings thereafter established.

Passing the objection that failure to hold that the Washington statute was repugnant to the provisions of of section 10 of Article 1 of the Federal Constution, is not assigned as error, the suggestion is without merit for the reasons:

(a) The language of the act does not, as heretofore shown, purport to confer any such privilege.

(b) General provisions, such as contained in the Act of Feb. 1, 1888, do not become an irrepealable part of charters or franchises secured during the existence of such provisions.

Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 83.

Chicago &c. Ry. Co. v. Minnesota, 134 U. S. 418, 455:

(c) The right to exercise the police power cannot be contracted away.

N. Y. & N. E. Railroad Co. v. Bristol, 151 U. S. 556, 576.

Chicago &c. Railroad v. Nebraska, 170 U. S. 57, 72.

Northern Pacific Railway v. Duluth, 208 U. S. 583, 596-7.

Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67, 76-7.

Chicago, M. & St. P. Ry. v. Minneapolis, 232 U. S. 430, 440.

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558.

And see: *Grand Trunk Ry. v. Indiana R. R. Comm.*, 221 U. S. 400, 404.

It follows that this case is squarely within the principles upon which this court has so often held that a railway company may constitutionally be required to bear the cost of devices required under the police power for protection of highway crossings opened over existing railways, as well as within the principles upon which the apportionment of such costs between the senior and junior lines was sustained in *Detroit &c. Ry. v. Osborn*, 189 U. S. 383.

It is stated by counsel that the question here presented is one of first impression in this court. To the extent that no case identical in facts or requiring the court to determine the constitutionality of the imposition of a portion of the burden of protective devices required by a new crossing of one railway by another, has been passed upon by this court, this is correct. But the

principles determinative of such question have, as shown, been repeatedly announced. And that a senior railway may be properly required to bear, without compensation, burdens incident to the protection of new crossings by junior lines, has been repeatedly decided by state supreme courts.

Thus in a condemnation suit brought by one railway company to obtain a crossing over the line of another, compensation cannot be recovered for the costs to which the senior company will be put for the installation of gates or crossing signals, the maintenance of a flagman, or of blowing whistles or ringing bells upon its engines, although such precautions are required by statute:

Mass. Cent. R. R. Co. v. Boston C. & F. R. R. Co., 121 Mass. 124, 126.

Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599; 24 S. W. Rep. 478, 484.

L. S. & M. S. Ry. Co. v. C. S. & C. Ry. C., 30 Ohio St. 604; 16 Am. Ry. Rep. 291, 305 et seq.

Detroit &c. Ry. v. Osborn, 189 U. S. 383, 388-9.

Nor for the expense incidental to the stopping and starting of trains which are by law required to be stopped on approaching an unguarded grade crossing.

Chicago & Alton R. R. Co. v. Joliet L. & N. Ry. Co., 105 Ill. 389; 14 Am. & Eng. R. R. Cases, 62, 70.

Peoria & P. U. Ry. Co. v. Peoria &c. Ry. Co., 105 Ill. 110; 10 Am. & Eng. R. R. Cases, 129, 133.

Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350; 31 N. W. Rep. 281, 290.

Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599; 24 S. W. Rep. 478, 485.

Kansas City &c. Ry. Co. v. Louisiana W. R. Co., 116 La. 178; 40 So. Rep. 627, 630.

There can be no distinction in principle between these cases and the case at bar, since the character of the protective device to be installed cannot affect the constitutional right involved; and if the State can lawfully require the senior line to submit without compensation to the burden and cost of stopping its trains before passing over a crossing, it can equally require it to share in the burden of the substituted protection of an interlocker. There is in fact a strong equity in the allocation of a part of the burdens of the interlocking device to the senior company, growing out of the fact that it is thereby relieved of the uncompensated burden of stopping its trains at the crossings so protected. The statute of Washington had provided:

> "All railroads and street railroads operating in this state shall cause their trains to come to a full stop at a distance not greater than five hundred (500) feet before crossing the tracks of another railroad crossing at grade, excepting at crossings where there are established signal towers and signal men, interlocking plants or gates."
>
> 3 Rem. & Ball. Codes, sec. 8626-69.

And to the extent that the senior line is relieved of this burden by the installation and maintenance of the interlocking plant, it receives a direct pecuniary benefit therefrom.

Such courts have further repeatedly sustained, directly or by necessary implication, the constitutionality of statutes apportioning the cost of interlocking devices

required at railway crossings between the senior and junior lines.

Toledo Ry. & Term. Co. v. Lima & T. T. Co., 79 Ohio St. 136; 86 N. E. Rep. 515, 518.

Cincinnati &c Ry. Co. v. Railroad Comm., 180 Ind. 243; 102 N. E. Rep. 852.

Detroit &c. Ry. v. Commissioner, 127 Mich. 219; 86 N. W. Rep. 842 (affirmed, 189 U. S. 383).

Grand Trunk W. Ry. Co. v. Hunt, 40 Ind. App. 168; 81 N. E. Rep. 524 (Affd. 221 U. S. 400).

L. & N. R. Co. v. N. O. T. Co., 120 La. 978; 45 So. Rep. 962.

Wabash R. Co. v. Commissioners, 120 Mich. 697; 79 N. W. Rep. 910.

Railroad & W. Com. v. L. & M. Ry. Co., 267 Ill. 337; 108 N. E. Rep. 347.

It is insisted that these cases either involve crossings in existence prior to the order requiring the installation of the interlocking device, or are cases where the statute requiring the apportionment antedated the construction of the senior line. But as heretofore pointed out, these are immaterial differences.

The case principally relied upon by counsel for the Pacific Company is *State v. R. R. Comm.*, 140 Wis. 145; 121 N. W. Rep. 921. This case arose upon an application of the Wisconsin & Northern Minnesota Ry. Co. (hereafter referred to as the Wisconsin Company) to establish a grade crossing over a railway line of the Pacific Company in Wisconsin. The application was made pursuant to a statute (Laws Wis. 1907 p. 445, Sec.

1797-56), which provided that crossings should be above, below or at grade, as the Railroad Commission of the State should determine; that at the time of making such determination the commission should prescribe the kind and character of the protective appliances, if any, to be installed, maintained and operated; and should fix the proportion of the expense of such installation, maintenance and operation to be borne by the respective parties. The Wisconsin Company having filed its petition for the crossing, the Commission granted the desired authority, requiring the Wisconsin Company, however, to pay the expense of constructing the crossing, but apportioning the expenses of maintenance thereof equally between the companies. The order further required the installation of an interlocking plant; and apportioned the cost of construction, maintenance and operation of such plant equally between the companies. This order was brought before the court by the Pacific Company for review, it claiming that the imposition of any of these costs upon it was without authority of law and deprived it of its property without due process of law. The Pacific Company's road had been constructed nearly twenty years, and when the rights of way therefor were acquired and the road constructed, the statute defining the powers of railroad corporations and relating to the crossing of tracks of railroads provided:

> "To cross, intersect, join and unite its railroad with any railroad heretofore or hereafter constructed, at any point on its route and upon the grounds of such railroad corporation with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections. And any corporation whose railroad is or shall be

hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor or the points and manner of such crossings and connections the same shall be ascertained by commissioners to be appointed by the court, as is provided in this chapter in respect to acquiring real estate. *But no corporation which shall have obtained the right of way and constructed its road at the point of intersection before the application for the appointment of commissioners may be made shall be required to alter the grade or change the location of its road, or be required to bear any part of the expense of making and maintaining such crossing or of such proceeding.*"

(The italics are ours.)

Subd. 6 sec. 1828, Statutes of 1898 of Wisconsin.

This statute is substantially identical with the Washington Act of Feb. 1, 1888 except that the latter contains nothing corresponding to the italicized clause above quoted.

The Wisconsin Act of 1907, under which the Commission apportioned a part of the costs of the crossing and interlocking device to the senior company, was in direct conflict with the provision italicized in the above quotation, under which the senior company had acquired its rights of way and constructed its road; and was a violation of the contract to the extent that a contract was thereby created. *And it was solely because of this fact that the Wisconsin Court held that these burdens could not be imposed upon the senior company without compensation.* After quoting the statute, it said:

> "So, under this statute, in force at the time appellant constructed its road, there can be no doubt that railroads thereafter crossing were required to pay all the expense of constructing and maintaining such crossing. * * * The appellant, therefore having acquired its right of way under the statute referred to, protecting it from all damages occasioned by the crossing of the junior road, must have a vested property right which cannot be taken for the benefit of another railway without compensation. * * * It seems clear, therefore, under the authorities, that the appellant, when it constructed its road prior to the passage of chapter 454, Laws of 1907, acquired a vested property right which cannot be divested without compensation." (p. 924-5.)

It is entirely upon this theory of "a vested property right" to hold its property free from all costs resulting from a crossing by a junior line, that the argument of the Wisconsin Court is based. And since the clause in the Wisconsin Act upon which the "vested property right" theory is founded by the court, is not contained in the Washington law under which the Pacific Company's road in that state was constructed, the ruling of the Wisconsin Court is not applicable here. Moreover, aside from this distinction, the reasoning of the Wisconsin court is not convincing. The limited character of the police power and the restricted character of the reserved power to alter, amend and repeal charters, as stated in the opinion, are not in harmony with the rulings of this court upon such questions.. (See *Grand Trunk Ry. v. Indiana R. R. Com.*, 221 U. S. 400, 404.) And however controlling the decision of the Wisconsin court may be as to such powers as exercised in

Wisconsin, it has no controlling weight where the question is, as here, the extent of the limitations derived from the Fourteenth Amendment to the Federal Constitution.

It is further contended on behalf of the Pacific Company that the grade crossing, which necessitates the safety devices, was adopted to save the Willapa Harbor Company $348,000, which would have been the cost of a grade separation; and this question is asked: "Suppose an overhead crossing had been required by the Commission at a cost of $348,000, would it be contended that one half of such cost could be imposed on plaintiff in error?" It is further urged that the Willapa Harbor Company selects its own location; that it might be that a slight change therein would have obviated the necessity of a crossing at all, or have rendered an overhead crossing practicable; that as to such matters the Pacific Company had no opportunity to be heard. And based on these considerations, it is argued that the state law, as construed and applied by the Washington Court, is so arbitrary and unreasonable as to amount to a taking of property without due process of law.

While the constitutionality of the apportionment of burdens imposed under the police power, is not to be determined by considerations of the equity of the apportionment, (*Mo. Pac. Ry. v. Omaha*, 235, U. S. 121, 129; *N. Y. & N. E. Railroad v. Bristol*, 151 U. S. 556, 570-1;) we cannot give apparent assent, by silence, to these contentions which assail not only the fairness of the law, but of the Supreme Court of Washington by whom the apportionment in this case was made.

(1) Had an overhead crossing been required, a portion of the cost thereof, presumably, one-half, would, under the statute, have fallen upon the Pacific Company. Such was the construction placed upon the act by the counsel who now asks if such a contention could be made (Brief, p. 23), in the petition for a rehearing filed with the Supreme Court of Washington on behalf of the Pacific Company in this case. This iterpretation of Sec. 6, Subd. C, to the extent that it held that it required the apportionment of the costs of over-crossings and under-crossings, was correct.

And see:

Toledo Ry. & T. Co. v. Lima & T. T. Co., 79 Ohio St. 136; 86 N. E. Rep. 515.

Cincinnati N. T. Co. v. P. C. C. & St. L. Ry. Co., 79 Ohio St. 243; 86 N. E. Rep. 987.

The avoidance of the overhead crossing was thus quite as beneficial, financially, to the Pacific Company as it was to the Willapa Company.

Further, as pointed out by the Supreme Court of Washington and heretofore noted, the Pacific Company receives in addition to the increased safety of its operation, a direct pecuniary benefit from the installation of the interlocking device by being thereby relieved from the uncompensated burden of stopping its trains as they approached the crossings.

2. The contention that the junior company selects the place of crossing and that the senior company has no opportunity to be heard with respect thereto, ignores the provisions of the crossing act requiring permission

of the Public Service Commission before any grade crossing can be installed, which permission can be granted only after a public hearing, of which "at least ten days' notice to the railroad company or companies and the county or municipality affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard", must be given; a provision which the record shows was fully complied with in the present instance.

The fallacy in the contention of the Pacific Company, is that it assumes throughout the existence of a vested property right in itself as the senior company, to maintain its railway freed from all burdens of crossings by other railways save in so far as it shall first receive compensation therefor, such compensation to be not only for property which may be taken, but for all burdens which may, in consequence of the crossings, be imposed upon it under the police power. But, as abundantly shown by the authorities cited, it never had such right.

II.

THE STATUE IS VALID AS AN AMENDMENT TO THE CORPORATION LAWS OF THE STATE OF WASHINGTON, AND AS A REGULATION TO WHICH THE RIGHT OF RAILROAD CORPORATIONS TO EXERCISE THEIR CORPORATE FRANCHISE AND HOLD AND ENJOY THEIR GRANTS, IS SUBJECT.

Section 1 of Article XII of the State Constitution provides:

> "Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law."

We have noted that the act approved February 1, 1888 (sec. 8736 Remington & Ballinger's Codes), by virtue of which the Pacific Company claims a vested right to hold its railway free from uncompensated burdens imposed by law for the protection of such crossings, was in form a corporate charter provision: "Every corporation formed under this chapter for the construction of a railroad shall have the power to cross," etc. It is a regulation applicable to and controlled the construction and maintenance of railways. The crossing act of 1913, which by necessary implication amends the pre-existing law, although not in form a charter pro-

vision, is in substance a corporate regulation. The requirement of overcrossings and undercrossings where practicable, is imposed as a condition upon the right to construct and maintain railways in the state. The provisions with respect to the acquisition of property necessary to compliance with the requirements of the act, the apportionment of the costs and expenses, etc., are all details governing the manner by which the end in view—the expediting of movements, and securing of greater safety at the crossings—shall be accomplished; and they are all a part of the corporate law of the state, subject to which the railway companies are permitted to hold their railway properties and exercise their franchises. That if these provisions had been incorporated in the constitution, or in the corporate laws in force at the time the Pacific Company acquired its right of way and franchise, it would have held such right of way and franchise subject to the limitation therein contained and subject to the duty to bear a portion of the expense of crossing by other railways, is conceded. (Brief of Pltff. in Error, pp. 22-3.) And inasmuch as the Pacific Company acquired and holds its franchise rights and its right of way subject to the reserved power of the legislature to alter, amend or repeal the general laws constituting its charter and to regulate its operations in the state, it holds such franchises and right of way subject to the right of the state to now enact such provisions and impose upon it the burdens of compliance therewith.

Speaking of the extent of the reserved right to alter, amend and repeal corporate charters, this court said:

"We think it safe to say that whatever rules

Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment."

Sinking Fund Cases, 99 U. S. 700, 721.

Unquestionably the reserved power of amendment is not unlimited, but that under it the state may enact provisions in which the state has a public interest, particularly when those provisions have relation to public safety, has been repeatedly determined; and it has been repeatedly held that statutes, such as this crossing act, may be constitutionally enacted thereunder.

N. Y. & N. E. Railroad v. Bristol, 151 U. S. 556, 567-8; affirming *N. Y. & N. E. R. Co. v. Town of Bristol*, 62 Conn. 527; 26 Atl. Rep. 122.

Holyoke Co. v. Lyman, 15 Wall. 500, 519 et seq.; *affirming Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446.

Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 98, 106-7; affirming same case, 78 Ia. 367; 43 N. W. Rep. 224.

Fair Haven R. R. Co. v. New Haven, 203 U. S. 379, 387-8; affirming same case, 77 Conn. 677; 53 Atl. Rep 960.

And see:

Fitchburg R. Co. v. Grand Junction R. & D. Co., 4 Allen 198, 205.

In re Selectment of Norwood, 161 Mass. 259; 37 N. E. Rep. 199, 201;

Portland & R. R. R. v. Inhabitants, 78 Me. 61; 2 Atl. Rep. 670, 671-2.

Albany Northern Co. v. Brownell, 24 N. Y. 345, 347.

Missouri O. & G. Ry. Co. v. State, 29 Okl. 640; 119 Pac. Rep. 117, 120.

Storrie v. Houston City St. Ry. Co., 92 Tex. 129; 46 S. W. Rep. 796, 799.

The Washington Statute clearly falls within the principles announced in these decisions.

We respectfully submit that the judgment of the Supreme Court of Washington should be affirmed.

BURTON HANSON

H. H. FIELD

F. M. DUDLEY

Attorneys for Defendant in Error..

F. M. DUDLEY

Of Counsel.

4.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

No. 327.

NORTHERN PACIFIC RAILWAY COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON,

Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY,

Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

CHARLES W. BUNN,
CHARLES DONNELLY,
L. B. daPONTE,
Attorneys for Northern Pacific Railway Company.

W. V. TANNER,
HANCE H. CLELAND,
Attorneys for Public Service Commission.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1918.

No. 327.

NORTHERN PACIFIC RAILWAY COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON,

Plaintiffs in Error,

vs.

PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY,

Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

At the risk of reiteration of what has been said, we desire to make a brief reply to the arguments advanced by defendant in error.

(1) It is first urged, (brief pages 10-14) that the distinction between a new and existing crossing, predicated upon the idea that where the junior road has obtained the

right to cross and has constructed its line, it is thereafter upon an equality with the existing road, is inapplicable, for the reason that the record discloses that defendant in error had already acquired the right to cross. But the record discloses that a stipulation was entered into between the two corporations by the terms of which plaintiff in error permitted defendant in error to cross, provided the latter should install and maintain the interlocker at its sole expense; and if it should be finally determined that plaintiff in error should contribute to the expense it would do so; but it was expressly provided by paragraph V that the stipulation "shall not prejudice or affect in any way the contention made by the respective parties as to the apportionment of the cost" of installation and maintenance of the device. (Rec. p. 12-14.)

(2) It is next urged (brief p. 17) that the Act of 1888, R. & B. Code, Sec. 8736, does not confer on the senior road a right in terms to compensation for the cost of protective devices at the crossing, leaving such matters to be determined by the courts under general rules of law, which do not require compensation for the cost of such devices required under the police power. But the answer to this is that the state supreme court, in view of all existing pertinent constitutional and statutory provisions, had held, prior to the enactment of the crossing statute of 1913, that the road desiring to cross must pay the entire cost of these very devices. (*State ex rel North Coast R. Co. v. N. P. R. Co.*, 49 Wash. 78.) This holding was in accordance with all authority, as appears from the opinion in *State ex rel N. P. R. Co. v. R. R. Com.*, 121 N. W. 919, where there is an elaborate review of the authorities.

(3) It is next urged, (brief p. 20) that the distinction we make between the exertion of the police power by and in the interest of the state or a municipality, is without basis. But this is only an assertion, not an argument. There is abundant authority in adjudged cases for this distinction. *State ex rel N. P. R. Co. v. R. R. Com.*, 121 N. W. 919, and cases cited.

That such a distinction exists is manifest upon considering that from the very earliest times it has been held that a railroad corporation may be required to protect grade crossings of municipal or state highways at its own expense, regardless of the question of priority in time; whereas it has been held with the same unanimity that as between two railroads the later in time must make the crossing safe at its sole expense. In other words, *the rule applicable to crossings between municipal highways and railroads has never been applied to crossings by one railroad over the tracks of another. State v. R. R. Com.*, 121 N. W., and cases cited.

(4) It is next urged (brief p. 23) that, while the question here presented has not been decided, the principles applicable have repeatedly been announced, in that it has been held by certain state courts that in an action to condemn a crossing the cost of gates, crossing signals and a watchman cannot be recovered. The cases cited are not pertinent. On the contrary, the authorities are opposed to the point made. Thus, in *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. 281 (a case cited by defendant in error) it was held in a condemnation case that the cost of maintaining signals, a crossing

system and a watchman were proper elements of damage. In *Butte & A. P. R. Co. v. Montana U. R. Co.*, 16 Mont. 504, 41 Pac. 232, it was held that the expense of a watchman at the crossing should be imposed upon the new road. In *West J. & S. R. Co. v. Atlantic C., etc., Co.*, 65 N. J. Eq. 622, 56 Atl. 890, it was held that the junior road must pay the entire cost of making the crossing safe, including the safety devices or a watchman if required. In *State ex rel N. C. R. Co. v. N. P. R. Co.*, 49 Wash. 78, 94 Pac. 907, it was held that the junior line must pay the entire cost of an interlocking device required at the insistence of the senior road to make the crossing safe. In *N. P. R. Co. v. Union Lumber Co.*, 76 Wash. 563, the court approves the rule laid down in Cyc., V. 15, p. 698, to the effect that the cost of erecting signals and maintaining a crossing system, as well as the cost of a watchman, needed to make the crossing safe, may be recovered in the condemnation proceeding. In *Winona & S. W. Ry. Co. v. C. M. & St. P. R. Co.*, 50 Minn. 300, 52 N. W. 657, the junior road was required to do whatever was requisite to make the crossing safe and to interfere as little as possible with the senior road, which happens to be the defendant in error in the case at bar; and in the case of *C. M. & St. P. R. Co. v. Old Colony T. Co.*, 216 Fed. 577, the same corporation urged the same point with equal success. Other authorities to the same effect are *Elkins, etc., Co. v. Western, etc., Co.*, 163 Fed. 724 (C. C. W. Va.), where a statute permitting a crossing, such as our Sec. 8736, was construed, in order to be constitutional, as giving to the senior road the right to recover in the condemnation proceeding any costs it might be required to pay in order to

make the crossing safe, pursuant to state laws. The rules for measuring compensation in this kind of case are extensively considered in *L. S. & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21, followed in *C. & W. I. R. Co. v. Englewood C. R. Co.*, 115 Ill. 375.

We submit there can be no question of the right secured by plaintiff in error when it located its railroad, and at that time it could only be crossed under the laws of this state upon making full compensation, including the cost of the necessary safety devices. This was a vested right which could not be taken by subsequent legislation without compensation. If, as often held, a railroad right of way be private property, (*W. U. T. Co. v. Pa. R. Co.*, 195 U. S. 540) it is difficult to see upon what basis of law or reason a contrary contention may rest. That the cost of making the crossing safe is a substantial loss to the senior line, is without question. Were there involved here a crossing between two private corporations or individuals no one would imagine the possibility of urging the contention made by defendant in error. It would carry its own reputation. Yet, in its relations to defendant in error and in all else, save only the right of public use, there is no distinction between railroad property and that of private individuals. *W. U. T. Co. v. P. R. Co., supra. Elkins, etc., R. Co. v. Western, etc., Co.*, 163 Fed. 724; *C. M. & St. P. R. Co. v. Old Colony T. Co.*, 216 Fed. 577. The police power is not, like the war power, paramount to all constitutional limitations. The right to regulate rates of public service corporations in the exercise of the police power is subordinate to the Fourteenth Amendment, for it cannot be exerted in such way as to deprive the corporation of a reasonable return on its property.

We submit, therefore, that counsel errs in supposing that the legislation in question is a ligitimate exercise of the police power, as heretofore understood and applied to the facts appearing in the case at bar.

(5) It is next suggested, (brief p. 29) that the plaintiff in error is benefited to the same extent as defendant in error by the interlocker, because had an over crossing been required plaintiff in error must have been charged with one-half of the $348,000 additional cost. If anything additional were needed to demonstrate the utterly arbitrary and unreasonable nature of the act, as applied to the facts of the case at bar, we have it here. No doubt it is true that there is as much reason for construing the statute so as to impose this cost as the cost of the interlocker. In order to sustain the judgment below it must be held, as counsel contends, that plaintiff in error might have been charged with one-half the $348,000. But we submit that, according to all authority, the existing line could not have been burdened with this expense in order to assist a competing line to build its road. Such an expense would be attributable to the crossing proper—an integral part of the roadbed and track. This cost was saved to defendant in error by substitution of an interlocking device. When it is remembered that defendant in error located its road to suit its own interest; that plaintiff in error was not consulted, and had no right to make objections to the plan proposed; that the Public Service Commission has no jurisdiction save only to permit or refuse a grade crossing, being wholly without jurisdiction to require a change in the location of the line; and when

it is further considered that it might well be that a slight change in location and route would obviate the necessity of any crossing at all; the monstrous injustice of requiring the senior company to pay half the costs of a separation of grade, or of an interlocker substituted therefor, is too apparent for denial. It is said that plaintiff in error had a right to be heard on these matters. But this is a mistake. The statute gives the Commission no jurisdiction, save only to determine what kind of a crossing shall be constructed. They cannot refuse the right to cross, nor order a crossing at another and different point, nor require the location of the line to be changed so as to avoid a crossing altogether. Such matters are exclusively within the province of the corporation desiring to cross.

(6) Lastly, it is urged, (brief p. 32) that the legislation is valid as an amendment to the charter of the corporation. But this contention is well answered by the opinion in *State v. R. R. Commission*, supra. The power of amendment cannot be exercised so as to deprive a corporation of a right already vested and in enjoyment. *Sinking Fund Cases*, 99 U. S. 700; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646. Besides, the power to amend is reserved in the interest of the State to modify its own contract with the corporation. It cannot be exerted in favor

of merely private rights. *Tomlinson v. Jessup*, 82 U. S. 454.

Respectfully submitted,

CHARLES W. BUNN,
CHARLES DONNELLY,
L. B. DA PONTE,
Attys. for Northern P. R. Co.

W. V. TANNER,
HANCE H. CLELAND,
Attys. for Public Service Com.

NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* PUGET SOUND & WILLAPA HARBOR RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 327. Argued April 28, 1919.—Decided June 2, 1919.

A railroad company by constructing its road gains no vested right to the retention of a general rule of law, then in existence, laying the expense of installing and maintaining required safety devices, where one railroad exercises its right to cross another, upon the company making the crossing; and it is not deprived of its property without due process by a change of the rule under which it is required to share such expense equally with a junior company. P. 335.

94 Washington, 10; 97 *id.* 701, affirmed.

THE case is stated in the opinion.

Mr. Lorenzo B. da Ponte, with whom *Mr. Charles W. Bunn*, *Mr. Charles Donnelly*, *Mr. W. V. Tanner*, Attorney General of the State of Washington, and *Mr. Hance H. Cleland*, Assistant Attorney General of the State of Washington, were on the briefs, for plaintiffs in error.

Mr. Heman H. Field, with whom *Mr. Burton Hanson* and *Mr. F. M. Dudley* were on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The defendant in error, Puget Sound & Willapa Harbor Railway Company, hereinafter designated the Willapa Company, a railroad corporation organized under the laws of the State of Washington, in the construction of a new line of railroad in 1914, found it necessary to cross at grade, at two places, tracks which had been constructed in 1890–1892 by the plaintiff in error, Northern Pacific Railway Company, hereinafter designated the Pacific Company, a corporation organized under the laws of the State of Wisconsin.

In appropriate proceedings, provided for by the state law, the Public Service Commission of the State of Washington granted authority and permission to the Willapa Company to cross the tracks of the Pacific Company at grade at the two designated places. This permission was subject to the condition that suitable interlocking devices, of a type to be agreed upon between the two companies, should be installed at the crossings. The companies agreed upon all of the conditions involved in the crossing of their tracks, excepting as to the cost of installing and maintaining the required interlocking devices,

and upon due submission of this question to the commission it was decided that the entire expense should be borne by the junior, the Willapa Company. The Superior Court affirmed this holding by the commission, but on appeal the Supreme Court of the State, in the decision which we are reviewing, reversed the two lower tribunals and ruled that the expense should be divided equally between the two companies.

The decision of the Supreme Court of Washington is based upon the interpretation which it placed upon applicable state statutes enacted in 1913 (c. 30, Laws of Washington, 1913, p. 74), and the case is presented to this court on the single assignment of error:

"The State Supreme Court erred in holding and deciding that Chapter 30 of the Laws of 1913, as construed and applied to the facts of this case, is not repugnant to the Fourteenth Amendment to the Constitution of the United States."

Conceding that the construction placed upon the state statute by the State Supreme Court will be accepted by this court, the contention of the Pacific Company is that when that company entered the State of Washington and constructed its line, an act of the legislature, passed in 1888, was in effect, which gave to railway companies formed under the act the right to cross any other railway theretofore constructed, but subject to conditions which the State Supreme Court held, in 1908, in *State* v. *Northern Pacific Railway Company*, 49 Washington, 78, required the junior company to pay the entire cost of the crossing, including the installing and maintaining of interlocking devices where necessary; that this constituted a vested right of property in the senior company, and that the later statute of 1913, which the Supreme Court held in this case required it to bear one-half of the cost of installing and maintaining the interlocker, deprived it of its property without due process of law.

It is admitted in argument that the act assailed would be validly applicable to apportioning the cost of crossings of highways and railroads regardless of the dates of their construction, (*New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226), and that it would be valid as applied to crossings of railroad lines constructed prior to its enactment where no contract had been entered into with respect to the protection of the crossing. *Detroit &c. Railway* v. *Osborn*, 189 U. S. 383. But it is contended that it is not a valid law as applied to the case at bar, where the road of the Pacific Company was constructed at a time when the state law imposed the entire cost of the construction and maintenance of the crossing upon the junior company.

Obviously this is a slender thread on which to hang a grave constitutional argument, and it is difficult to treat it seriously.

At most the earlier statute, and the interpretation which the State Supreme Court placed upon it, was a rule of law applicable to the assessment of damages in a proceeding to appropriate a crossing to which a junior company was entitled by the statute. It was no part of the charter of the Pacific Company, which was organized under the Wisconsin law, and that company had no vested right to insist that the rule should not be changed by statute or by court decision. *Pennsylvania R. R. Co.* v. *Miller*, 132 U. S. 75, 83; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 189; and *Chicago & Alton R. R. Co.* v. *McWhirt*, 243 U. S. 422–5.

While this is sufficient to dispose of the case, it may be added that the Act of 1913 was passed in an obviously legitimate and customary exercise of the police power of the State to protect travelers and employees from injury and death at such crossings, and also to protect property in

the custody of the carriers from damage. It has long been settled law that the imposing of uncompensated charges, involved in obeying a law, passed in a reasonable exercise of the police power, is not a taking of property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57, 73, 74; *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, 461, 462; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 594; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76.

The judgment of the Supreme Court of Washington is *Affirmed.*